

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, INC.,

08CV2755

Plaintiff,

vs.

July 2, 2015

8:30 A.M.

SAP AMERICA, INC., ET AL.,

Volume 14

Defendants.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE
AND A JURY

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1 THURSDAY, JULY 2, 2015, 8:35 A.M.

2 THE COURT: Good morning, ladies and
3 gentlemen.

4 You saved Jayden from the zoo again.

08:36:31 5 MR. MILLER: Your Honor, shall I continue?

6 THE COURT: You may continue.

7 MR. MILLER: Thank you.

8 Good morning.

9 THE JURORS: Good morning.

08:36:38 10 MR. MILLER: I'm going to pick up right
11 with the slide that I left off. Okay? SAP never told
12 Hodell to abandon Business One. What we covered
13 yesterday, SAP worked very hard after go-live to help
14 Hodell, right? And the solution objectively, you can't
08:36:55 15 look at this any other way. It got better.

16 Okay. Now, In-Flight was always a problem
17 and still is a problem, and ultimately is what did this
18 solution in, but there can be no dispute in this case,
19 they went live, they had some issues. I think the phrase
08:37:15 20 I used yesterday was SAP pounced on this, thousands of
21 hours. There was improvement.

22 I was moving fast towards the end of
23 yesterday, but showing you objective indicia of actual
24 improvement, Patch Level 25, Patch Level 29, the test
08:37:32 25 that Eddy Neveux did in October, and then again, the

1 point that IFE was the real problem and we looked at the
2 different charts.

3 When Hodell presented their case and in
4 their closing argument, they took the position that
08:37:50 5 notwithstanding of everything that I just said, that on
6 November, I think it's 16th or 17-th, we'll look at it in
7 a second -- we told them abandon Business One. That they
8 got like a notice from us that if you held it up, it said
9 abandon Business One. Okay.

08:38:07 10 And the document that they referred to as
11 the, you know, notice to abandon Business One is Exhibit
12 109. Okay. Can we call that up, please?

13 Now, this is a little bit complicated.
14 There's a sentence -- here's -- this is highlighted
08:38:29 15 because we're going to walk through it. Let me show you
16 the sentence that they referred to and they did it in
17 closing argument, and they did it throughout this trial.

18 Look at the second paragraph. Okay? They
19 say, "From the SAP side," could you maybe go in green,
08:38:45 20 Bob, with the first sentence of the second paragraph?

21 Go ahead. The whole first sentence of the
22 second paragraph. "From the SAP side, as it relates to
23 the integration points, the acronyms you listed below, we
24 have evaluated the processes and approach," and just to
08:39:03 25 be clear, right, this is from Michael Sotnick, a senior

1 SAP person, to the Reidls. And again, this is what they
2 point to and they say this is what told us to abandon
3 Business One.

4 "From the SAP side as it relates to the
08:39:18 5 integration points, the acronyms you listed below, we
6 have evaluated the processes and approach and have come
7 to the conclusion that there is no change that we can
8 make on our side that would result in a material
9 improvement."

08:39:29 10 And they say, "See, they told us to abandon
11 this." Let's break it down. "The integration points,
12 the acronyms you list below," let's scroll down and see
13 what that is, just to the e-mail below.

14 Otto Reidl.

08:39:42 15 Keep going, right there, go up. You have
16 to go up more. There's a reference -- hold on, guys.
17 Let me show you where it is. You got it? Yes. Exactly.

18 "I've been staying on the side lines," et
19 cetera, "since our meeting. Are the problems so" -- et
08:40:12 20 cetera, et cetera, "resolve the problems relating to SAP
21 software and the DI API interface."

22 Okay. So scroll back up. So just in that
23 one sentence, okay, all we're saying -- go up to the
24 green part -- right. From the SAP side, all we're saying
08:40:28 25 is the DI API, right, there's Business One and it has

1 that pipe that's the DI API, okay, we're saying we've
2 worked to improve our pipe, even though we think the
3 problem is In-Flight, you guys are pumping too much
4 information through the pipe, we've worked to improve the
08:40:43 5 pipe, and it's gotten better, but we don't expect the
6 pipe to get much better.

7 And why are we saying that? We don't think
8 the pipe is broken in the first place. We worked to
9 improve it, but the problem is In-Flight pumping too much
08:40:57 10 information in the pipe.

11 So this sentence is not what they suggest
12 that it is. It's just us saying, look, we worked on the
13 pipe, we made it better, don't expect it to get much
14 better. It's as good as it's going to get. And we don't
08:41:11 15 have any problem with making that statement. We don't
16 think there's anything wrong with the pipe. The problem
17 is In-Flight.

18 But it's much, much more than that. Look
19 at the rest of this. Look at the whole thing. Again
08:41:21 20 Michael Sotnick, Senior, writing to Otto. Scroll up just
21 to get the date so I know I had it right. Right.

22 November 16th. "Our team's worked with
23 yours and LSi and have systematically eliminated some
24 issues and brought others to the forefront."

08:41:36 25 Good. Then there's the sentence we went

1 over about DI API. Look at the rest. They don't focus
2 on this, Hodell. "That being said, we've also worked
3 with LSi on the architecture of their integration to
4 identify areas that would help speed the communication
08:41:51 5 between applications."

6 What's he talking about there? He's saying
7 we went back to LSi to work on In-Flight so they can stop
8 shoving so much information in the pipe. Okay?

9 And then it says, "In this case, speed is
08:42:05 10 related to having the applications talk to each other
11 less often. Some of those recommendations have been
12 implemented by LSi."

13 What's the implication? There's more work
14 to be done there, right? LSi should keep doing this,
08:42:18 15 keep fixing the amount of information that's getting
16 pumped through the pipe. Okay?

17 It's not saying let's all walk away, but it
18 gets -- there's more. "We're working with LSi on an
19 independent evaluation of In-Flight. They have provided
08:42:32 20 assistance by providing some of their code," it's right
21 here, "For evaluation, but they've not delivered the full
22 application set. SAP has offered to pay for this and has
23 requested that LSi participate."

24 So now we're not only pointing out that
08:42:50 25 we've worked to improve -- get them to improve In-Flight

1 and we expect them to keep going, we're willing to
2 evaluate their code. We're going to keep working is what
3 that sentence says.

4 Then you go down here, more, right? "We
08:43:05 5 spent significant time evaluating your hardware
6 environment and have identified some quick fixes. But
7 we're doing more. We're proceeding with a direct
8 engagement with Citrix on your behalf for a more expert
9 evaluation."

08:43:18 10 We believe there are material gains to be
11 made in this area. So they're not saying, quick, abandon
12 Business One. They're saying a lot different than that.
13 This is very -- this is a very forward-looking
14 progressive e-mail talking about let's keep working, get
08:43:36 15 LSi to fix In-Flight more, we'll take a look at their
16 code, we'll spend the money. Oh, your hardware wasn't
17 right. You got to keep working on that. There are
18 material gains to be made.

19 This is all the stuff that Hodel doesn't
08:43:50 20 show you when they show 109. They go right to that one
21 sentence and say, "See, they told us to abandon Business
22 One." It's not true.

23 Down here, "As you can see from the above,
24 a great deal has occurred in the past two months. We
08:44:04 25 talked about taking both a short-term and long-term

1 approach and working both simultaneously. This has and
2 continues to happen. I look forward to discussing our
3 long-term approach with you in more detail the week after
4 Thanksgiving and appreciate your patience as we work
08:44:23 5 through these actions."

6 Where in this document does it say, like
7 Hodell says, that we're telling them on November 16th
8 they've got to abandon Business One? And you see, they
9 need that in this case, right? Because what I've been
08:44:38 10 saying is true. SAP worked really hard. B1 got a lot
11 better. They ditched it and went to Profit 21, and they
12 need some explanation for why the heck did they do that.
13 And they don't really have one. So they point to 109 and
14 they point to that one sentence, and that's all they keep
08:44:57 15 refraining to you, but it's not accurate, right?

16 This is actually a very progressive e-mail
17 that reflect the hard work we did, the improvements that
18 have been made, and how much more work we expect to do
19 with them in the future to make B1 work for them, which
08:45:10 20 if they stayed with it, it would have been great. But
21 that's that.

22 I mentioned Profit 21. Hodell says that B1
23 was bad, right? But if B1 was as -- how could B1 be as
24 bad as they say when the solution that they picked after
08:45:38 25 two years of supposed evaluation was so much worse?

1 Right. There's a pattern here, okay, and we're going to
2 talk about that and we're going to talk about it right
3 now.

4 Take a look at 277, please. They had
08:45:53 5 FACTS, right, and they had Radio Beacon with that. We
6 remember the litigation letters, 195, 311, 312, Otto's
7 letters and Kevin's e-mails about litigation.

8 Then they move from FACTS to B1. Here we
9 are on B1, right? And then they go to Profit 21, again
08:46:13 10 after -- the one that's supposed, like how could B1 be
11 bad if Profit 21 is what they say it is here?

12 Look at the date, okay? May 22nd, 2009.
13 Okay. They're live with Profit 21. This is Kevin Reidl
14 writing to people that were associated with Profit 21.

08:46:33 15 He's talking in the first sentence, "I'd
16 like to update you on the status of our Profit 21
17 implementation." And, you know, we could read this whole
18 thing and you all will have access to the whole thing,
19 but I'm going to go right to the end. "To put things in
08:46:50 20 perspective," because I've read it and I think this is
21 what you want to see, "We were sold a system that will
22 streamline our operations and make us more profitable.
23 Our sales, like most other companies in the current
24 economic climate, are down significantly, both
08:47:06 25 year-to-date and in comparison to '08."

1 Can you go to the next page? "However, we
2 recently needed to hire three more employees to manage
3 the new work load. Not a good indication of efficiencies
4 gained, particularly since our product mix and customer
08:47:22 5 base has not changed."

6 Next, "I'm most disappointed because we
7 have lost customers through this."

8 There's a credibility issue here. Okay.
9 When they buy software, this is what you see, okay? Look
08:47:35 10 at the next one, 325.

11 Again, yes, thank you. Kevin Reidl to the
12 folks who implemented and were associated with Profit 21,
13 right to the heart of it. "Our business is off 25%, but
14 our head count is up." Boy, that sounds awfully
08:48:00 15 familiar. "Since the day we went live on P21, any
16 efficiency we had vanished with the implementation of
17 this software."

18 Okay. This goes to the heart of their
19 credibility. You'll have those with you if you'd like to
08:48:13 20 look at them in more detail.

21 And, look, we shouldn't even be talking
22 about damages. I'm going to wrap up in a couple of
23 minutes and I'm going to summarize all the reasons I told
24 you yesterday why. Okay.

08:48:32 25 This case has gotten very tiny. It's very

1 easy. But just like Hodell likes to pay attention to all
2 the facts after go-live because it doesn't really have a
3 case, doesn't have a case, just like they like to pay
4 attention to all those facts after go-live, they like to
08:48:48 5 pay attention to damages, and damages would like -- was a
6 huge piece of this case, way more than it should have
7 been. That's another sign, by the way, of a party that
8 doesn't really have a case. They're shifting, right?
9 They don't have a case.

08:49:02 10 It also goes to credibility. Hodell came
11 in here in their opening and they said that
12 they -- running B1 for two years from '07 to '09, almost
13 put them out of business. And I was taking notes as they
14 went. They said that they even faced liquidation in
08:49:21 15 2009. And mind you, basically the worst economic climate
16 that our country has experienced since the Great
17 Depression, the whole country was on the brink of
18 financial collapse or depression. They blamed all their
19 problems on Business One.

08:49:38 20 Well, the Court and the law has stepped in
21 on their damage claim, okay, and notwithstanding all the
22 stuff that you heard in the opening, the Hodell damage
23 claim has now been shrunk like lots of the other parts of
24 this case. And just to be clear, this is not me saying
08:49:57 25 this. Okay? Judge Nugent read you the, what's called

1 the jury charge, that document that he was reading
2 yesterday. If you remember, there were only three parts
3 to their damage claims that were left, and that's as a
4 matter of law in this case. That's not me saying that.

08:50:14 5 There's three things left, and Hodell won't
6 challenge this, and that's why when they did their little
7 math thing yesterday, they only had three components, and
8 it was the increased overhead, that was the 2.6 million,
9 it was the training and travel -- they guessed at that at
08:50:31 10 50,000 -- and it was their supposed out-of-pockets, which
11 are 830. Okay?

12 None of those are valid. I'm going to talk
13 about all three, but I want to start with the overhead
14 one. Okay?

08:50:42 15 Let's go here. You've heard this -- I'll
16 bring this a little closer. You've heard this before.
17 I'll try not to trip, but it matters. 2008, okay, was
18 the best year in sales that Hodell ever had. This was up
19 earlier in the trial. Excuse me.

08:51:18 20 I don't want to knock this over, either.
21 That's fine. If you can put it on the screen if you
22 don't mind, that's great.

23 And sales matter. B1 affects all parts of
24 their business, their ability to take orders, all the ERP
08:51:37 25 systems, software, affects and that's their point, all

1 aspects of their business, their ability to take orders,
2 their ability to process orders, their ability to ship
3 goods, their ability to pay for it, their ability to
4 track all that.

08:51:48 5 What's that? That's a sale, when you take
6 an order, process it, and get it out the door. The
7 first -- the only full year that they ran Business One,
8 they had the highest sales that they ever had. You can
9 stop right there. Okay?

08:52:06 10 It was in one of the worst -- the beginning
11 of one of the worst economic climates again our country
12 has seen in almost a hundred years, and they had their
13 best year ever. And remember they were saying, it was
14 really hard, we couldn't do this. All the things they're
08:52:23 15 talking about are associated with orders. It's hard to
16 process the sales orders, how to get the orders out the
17 door, all those things. If it was true, it couldn't be
18 the best sales year they ever had -- look at these
19 numbers, FACTS, FACTS, FACTS, FACTS, some FACTS, B1,
08:52:41 20 still goes up -- pardon me, that goes down but that was
21 some FACTS, B1, and look at this, the one year they ran
22 at 43 million, okay? That's just part of this.

23 Because even this, right, and Mr. Reidl
24 came in here and he talked about productivity, right, and
08:53:04 25 I'm going to look at that and what he did was he said

1 forget this, okay, the way you measure corporate success
2 is you figure out how many employees it took to ship a
3 given number of pounds of product. Okay?

08:53:22 4 In other words, very simple, count up the
5 people, weigh the product, and divide them and see how
6 many pounds does each employee in our company ship.
7 Okay?

8 We brought Geoff Osborne in here to tell
9 you something that you really already know, and it's you
08:53:38 10 don't measure corporate success in pounds. Okay? You
11 just don't measure corporate success in pounds. People
12 measure corporate success in dollars, okay?

13 And you can start here, and I think that
14 you can end here, but if you're going to do an analysis
08:53:56 15 like what Mr. Reidl wanted to do, and you want to measure
16 how much work can get done by each employee, okay, then
17 look at dollars. Don't weigh it. Don't weigh it.

18 Product -- diamonds are light. They're
19 expensive. Some really heavy things, lead, might be
08:54:23 20 cheap. You don't weigh corporate success; you measure it
21 in dollars. And that's why you've seen this repeatedly
22 in this case.

23 And this exhibit, if you're going to look
24 at productivity at all, likewise completely eliminates
08:54:34 25 this idea of an increased overhead productivity loss.

1 And here's why: Okay. This is -- these were the same
2 numbers that was on the other chart, right, because you
3 got the 43 million in 2008, the same exact gross sales.

4 And then Mr. Reidl totaled his employees.

08:54:53 5 And this was the all-in one, right? This is the one that
6 included the temps also, okay? So if you're going to
7 measure productivity by, hey, how much can each employee
8 do, and I can understand how that might make some sense,
9 okay, but they got the same problem.

08:55:12 10 In 2008, the only year that they ran B1 the
11 whole time, they had the most productive year ever, not
12 just in total sales, but in sales per employee.

13 So now we're not just talking about gross
14 sales, we're talking about efficiency, how much does each
08:55:32 15 employee do. And we're not weighing it, okay? Which is
16 ridiculous. We are looking at dollars and it was the
17 most efficient year they ever had.

18 Okay. One more step. If you're going to
19 ignore the total sales and you're going to ignore the
08:55:53 20 dollars and you're still going to weigh it, which is what
21 they insist on doing, right -- do you mind if I borrow
22 this exhibit -- - then you got to give us the detail.

23 If you were going to go there, which is
24 where you should never go in the first place, but if
08:56:10 25 you're going to go there and you're going to ignore the

1 43 million, the best year ever, you're going to ignore
2 that this document kills what they're saying, but if
3 you're going to ignore them both and you're going to go
4 here -- I'll try to remember to take that away so you
08:56:27 5 have the timeline -- and you're going to go here, you
6 have to give us -- actually, no. Can we put it on the
7 screen, Bob? Maybe that's best.

8 This is the exhibit that they routinely
9 came back to, to measure how, like, the pounds per
08:56:42 10 employee sometimes showed something, right?

11 You can talk about this thing for a long
12 time, and some of the witnesses did, probably longer than
13 they need to, but I want to show you something that I
14 think I can show you pretty efficiently that just takes
08:56:56 15 the air out of this. Okay?

16 Take gross sales -- and just go all the way
17 across, Bob. You guys will be familiar with those
18 numbers, it's those numbers and the numbers we looked at
19 before. And go down to sales and admin expense. Okay?
08:57:16 20 Sales and admin expense is a big part of this supposedly
21 productivity loss that they suffered that involves
22 employees and weighing stuff, okay?

23 And what they're really saying is that
24 those costs went up, and it was because of B1, and that
08:57:39 25 reflects that they had to hire more people and somehow we

1 need to pay them money.

2 Geoff Osborne walked in and he told us all,
3 look, you don't weigh stuff, corporate success is dollars
4 and we went to this and proved that, but then he, Geoff
08:57:52 5 Osborne, remember him, he was the guy, the CPA who we
6 brought in here, he said "Ladies and gentlemen, look at
7 sales and Admin. Starting in 2003, way before Business
8 One, it starts going up," right? And his point was "That
9 shouldn't happen. That's weird. Sales and Admin is
08:58:10 10 supposed to be kind of steady, okay? Cost of goods sold
11 and cost of product sold, and other costs of sale, they
12 might vary. This one, Sales and Admin, is supposed to
13 stay the same, but Hodell is saying it went up because of
14 Business One, but Geoff is saying no, no, it's going up
08:58:27 15 in 2004 and 2005, in 2006 and then it goes up in 2007.

16 He said that's weird. And he's right. But
17 here's where it gets really weird. Look at the sales
18 from 2006 to 2007. Okay? They go from almost 43
19 million, 42,9, down to 40, right? Well if you have less
08:58:50 20 sales, right, then your Admin, sales and administrative
21 expenses, should go down, right? And see how they went
22 up, actually? They went 7 million to 7.4. And that's
23 why I'm saying this is part of their equation. They're
24 saying, "Oh, see that? That's B1. Give us some money."

08:59:08 25 And my point is it's been going up for

1 years, and Geoff Osborne is all over this saying someone
2 needs to explain that. And then Geoff tried to unpack
3 it, right? So he explained, and we got Otto's testimony
4 on this, what's in that Sales Admin? What's in there?
08:59:46 5 Is that all just B1 if you look in there? No. No. No.
6 No.

7 Mr. Reidl testified and it does include
8 salespeople, but it includes a whole lot else. It
9 includes office people, travel, advertisements,
08:59:46 10 insurance, right from the transcript, bad debt, telephone
11 and telegraph, we'll remember that, it includes the
12 independent sales reps, their pay is in there. It
13 includes their auditor expenses, and it includes
14 executive salaries.

09:00:00 15 Okay? And Geoff Osborne said "Yeah, I know
16 all that stuff's in there. I need to see that. I need
17 to see the breakdown in order to determine what the
18 heck's been going on with you guys and why have your
19 sales and Admin been going up, and I'll show you this
09:00:17 20 isn't associated with Business One."

21 They never gave us those records. You
22 can't get -- you can't unpack that. That was Geoff's
23 point at the end of his testimony. That's weird that it
24 was going up. It was going up before they even had B1 so
09:00:30 25 I don't see how it could be associated with B1. The only

1 way you could even begin to understand whether this was
2 even remotely associated with B1 would be to unpack this
3 because, hey, maybe it's executive salary increases,
4 maybe the independent sales reps are getting paid more,
09:00:48 5 maybe, whatever, the advertisement, travel, office, bad
6 debt, telephone and telegraph, maybe it's all that stuff.
7 We can't tell. They have never given us the records.
8 Okay? The claim's got to die.

9 But there's more. Remember, Mr. Star
09:01:06 10 pressured Otto Reidl, "Did you or didn't you" it was late
11 in one of the afternoons, "Hire these supposedly 27
12 additional people that make up this 2.6 million that you
13 want" because ultimately that's what they're saying.
14 They're dodging and moving and slipping and sliding, but
09:01:25 15 ultimately, they're saying, "Hey, we had to hire 27 more
16 people" and Greg point blank asked Otto Reidl at the end
17 of the day, did you or didn't you, and we couldn't get a
18 straight answer out of him. Right?

19 And then he came in the next morning and he
09:01:40 20 testified, "Yeah, that's what we did. I've thought it
21 over. We hired 27 additional people."

22 Can you put that up, Bob, please?

23 This is his testimony fresh in the morning,
24 "Because I thought it over.

09:01:57 25 "How are you claiming that Hodel was

1 harmed? During this period, 2007 and 2008, we had at
2 least 27 people leave the employ. During that time our
3 pound volume declined. We wouldn't have replaced those
4 people if Business One" keep going, is there another way
5 to do this? Okay.

6 "And the number of people that we had to
7 replace, the number of people we had to replace times the
8 cost of those people for a 25-month period, amounted to a
9 \$2.6 million cost increase."

10 So he's saying, "I hired 27 more people,"
11 and I think, just bear with me for a second. Go to the
12 next one, Bob. And he was even more clear because Mr.
13 Star -- that was on direct, that was through his own
14 lawyers. He was even more clear when Mr. Star, whatever
15 1920 is, go to the next one. So that was him on direct,
16 and then Mr. Star comes back to him and says, "I want to
17 be clear. You're now --" it's just the beginning of
18 this -- "And you're now telling us, you're now telling
19 us, sir, that your damages theory is that 27 people left
20 the company and you had to hire 27 new people? That's
21 what you're telling us right now, sir, right? Correct."

22 Okay. But if that's the position that
23 they're going to take, and this has been our position
24 since the beginning of this case, they need to produce
25 proof about the 27 additional people. Who were they?

1 Where are they? It's easy to do. They have a \$40
2 million company. If they hired 27 additional people,
3 tell us who they are. Tell us how they were associated
4 in some way with Business One. Tell us how much you paid
09:03:45 5 them.

6 And Mr. Star, if you go back to this
7 text -- just blow up the whole bottom of it, Bob.
8 Actually, go back to the page, please. Just scoop it.
9 After "Correct." There you go, right there.

09:03:59 10 Mr. Star took him through this. And look
11 at the question at the bottom. "Sir, have you given us a
12 single record showing the name of even a single one of
13 these supposed 27 people who left your employ; yes or no?

14 "I've not provided that information.

09:04:17 15 "Can you agree with me that you've also not
16 given any information about these people?"

17 So he's not even -- we're not getting any
18 information "That you supposedly hired to fill those
19 spots?

09:04:29 20 "Employment levels don't stay stagnant."

21 Go all the way to the bottom. No. No.
22 There you go. Can you scroll down for the rest of the
23 text? There we go.

24 I'll cut right to the bottom. Bob, go to
09:04:44 25 the bottom, please. Right where you were, Bob. Sorry.

1 Right there. That's better. Perfect.

2 "Besides not giving us a single name of
3 any of the people, you say were replaced, you never told
4 us what you were paying them, paying those older workers
09:05:05 5 who left or what you might have been paying the new
6 workers who you hired to replace them, right? You've
7 never given us specific information? No."

8 So when it got down to it, he couldn't
9 decide what to say the one afternoon. He comes in the
09:05:18 10 next day and said, "I've thought it over. Yeah, we
11 hired." And we said we've been after this the whole
12 case. Who are they? Give us the records. They don't
13 have it. He admits it.

14 And then what happens? Yesterday Hodell's
09:05:33 15 counsel comes in and they changed it again. Now they're
16 saying, "No, no. We didn't hire 27 additional people.
17 That's why you don't have the records, it's just that the
18 people who were here worked harder."

19 So they've shifted and they shifted again.
09:05:48 20 We proved that they didn't have the records, and then
21 they shifted again. And now they're saying "Oh, these
22 ghosts," they are ghosts, there weren't actually 27
23 additional people -- "we just worked harder and we don't
24 have any proof of that."

09:06:02 25 Well, that's not a damages claim. So you

1 can take this whole productivity business and kick it,
2 okay? It's a false analysis. There was no loss. This
3 number, I believe -- well, you believe, that once you
4 understand this, says it all. Okay?

09:06:18 5 Just a couple of other things on damages.

6 Do you have your chart with the arrows?
7 Can you call it up on the screen, Bob? I don't know
8 where it is.

9 Do you remember this chart? Okay. This
09:06:42 10 chart is an outrage. Okay? This chart should not have
11 come into this courtroom, and it should not have been
12 presented to you.

13 Mr. Osborne pointed something out that is
14 dramatically important about this chart. There's an X
09:06:59 15 axis and a Y axis. The X goes across the bottom, right?
16 The Y axis goes over here on the left, right?

17 And if you look on the left, gross profit,
18 right, and it's in million dollar increments, right, and
19 gross profits, the blue, and they have this kind of
09:07:18 20 hairbrained scheme that somehow the difference between
21 these things suggest that, oh, my gosh, B1 was a problem,
22 except the red line doesn't track on the same parameters
23 as the blue line.

24 We've all seen charts, right? You have
09:07:33 25 something on the bottom, usually time. Something on the

1 top. And here it's dollars. Except the red line isn't
2 following the increments on the left. Look at this. On
3 the right side, it says, "Net profit," the red line is
4 following a different set of increments that are in
09:07:50 5 different sizes.

6 It's not -- it's warped. If you made the
7 lines on the right the same as the lines on the left, or
8 if you ran both lines from the left, those lines come
9 together. If you warp it and have the red line track,
09:08:09 10 what do you want to call it, a Z axis, it's going to
11 create that. That's what they did. I don't know who did
12 it, but that's what someone did.

13 So when you get to increased overhead, we
14 can be done with that. SAP received \$150,000
09:08:25 15 approximately for this software. They got the licenses,
16 they had the software. They can use it forever. They
17 only used it for two years. That was up to them. It was
18 their mistake, but we're even. Okay?

19 The overhead expenses that they say that
09:08:41 20 they incurred, you know, to spend on Business One, that's
21 money that they expected to spend in the first place.
22 There are no damages.

23 Okay? I need to make a couple things
24 clear, and I mentioned this yesterday but I'm not sure I
09:09:03 25 made it as clear as I should.

1 This case has shrunk, and it's not just me
2 saying this. The Court, the law shrank this case.
3 Remember, Judge Nugent was reading you the jury charge,
4 right, and he had the -- he was reading it right off of
09:09:28 5 there and explaining look, that's how it's done; we want
6 to get this exactly right.

7 In that charge, he was explaining to you
8 that this case is now down to very, very little. It's
9 the two marketing documents and the Penny Vitantonio
09:09:43 10 conversations. That's it. Okay?

11 This Court has found, as a matter of law,
12 that there is no breach of contract. No breach of
13 warranty. Found as a matter of law. They're gone, okay?

14 This Court has found, as a matter of law,
09:10:00 15 that neither IBIS and Dale, or LSi and Dan, are the
16 agents of SAP. That's gone. Okay. That's not me saying
17 this. The law is they're gone. They're not the agents.
18 Okay?

19 Likewise, it has been determined by the
09:10:19 20 Court, as a matter of law, and this is what was read to
21 you, not in exactly these words, but this won't be
22 challenged by Hodell because it's true. This isn't
23 argument; it's reality, the statements of Dale and IBIS
24 and Dan and LSi, if they ever existed in the first place,
09:10:38 25 they're not associated with SAP. Those are not our

1 statements. They're gone. Okay?

2 And again, as a matter of law, the only
3 basis for them to proceed are the two marketing documents
4 and the statements of Penny Vitantonio. There's
09:11:00 5 basically nothing left of the case, except for that.

6 And I want to talk about that briefly, and
7 I want to get this wrapped up.

8 First, the standard. We talked about clear
9 and convincing. There's preponderance, right? That's
09:11:15 10 like 51%, 49%, okay. Clear and convincing is a higher
11 standard. You need to have a firm belief and a
12 conviction. Okay? It's not beyond a reasonable doubt,
13 which is a criminal standard, all you'll ever hear. But
14 it's not preponderance. This is different, okay.

09:11:33 15 Substantially different. You have to have a firm belief,
16 a firm conviction. Boom, I got a firm belief. Okay.

17 That's not going to happen. That's for
18 each element of a fraud claim, and I'm not going to go
19 all through all of them, but one is you have to have
09:11:46 20 clear and convincing evidence, a firm conviction, that
21 there was a false statement, that there was an intention
22 to mislead, and that there was justifiable reliance.

23 They can't get any of these for any of
24 what's little bit left in the case. Penny Vitantonio,
09:12:00 25 right, she did not promise Otto that B1 was good for 300

1 or 400 or 500 users. She came in here, she was credible.
2 She said, "I don't do that. I wouldn't have done that.
3 If I ever did do that, I would have written it down
4 because I'm a salesperson and, gee whiz, that would be
09:12:24 5 fantastic."

6 And we know from her notes that she didn't
7 do that, and we had them up there yesterday. Four times
8 on four different occasions, four different conversations
9 with Otto, she wrote down 100 users. And then Otto,
09:12:41 10 remember, he had no notes -- he had notes of these
11 conversations, but no notes that said 300 or 400 or 500.

12 And we actually missed a quote yesterday
13 that's worth spending a second on because it goes to
14 credibility. And I realize he wishes the record was
09:13:05 15 different and -- I don't know what he wishes.

16 But this really goes right to the heart of
17 credibility on this issue, because he testified that the
18 reason he didn't write it down, 300, 400 or 500, is
19 because it was so important. Remember, he explained, "We
09:13:24 20 wouldn't have proceeded unless I got that assurance."

21 Mr. Star says, "So this jury understands, that's all I'm
22 trying to get to, you contend that during that meeting
23 you were told 300 users?

24 "That's my contention.

09:13:39 25 "And we can agree your notes say nothing

1 about that at all, right?

2 "Because that's such an important point, I
3 don't need to write that down when I'm told. That's an
4 assurance."

09:13:50 5 So in the history of notetaking, it turns
6 out Otto keeps notes on stuff that's not important, but
7 if it's really important, he doesn't take those notes,
8 and that's what he says to you under oath in court.

9 We know that that's not right. We know.
09:14:05 10 If you're trying to find out the truth on this issue, you
11 think about Penny, you look at Penny's notes, you think
12 about the record, it's easy. There's no clear and
13 convincing evidence. Somebody has to have a firm
14 conviction that she made that promise. She didn't make
09:14:25 15 it. There's definitely not a firm conviction of it. And
16 that's why they don't focus on this. Remember I told you
17 yesterday they hardly mentioned it.

18 Then we get to the marketing materials.
19 The statements at issue are in Exhibit 317, and I have
09:14:40 20 copies of them here. Sorry, I said 317. It's 314.
21 These are high-level marketing pieces. I got my own
22 personal copy here, but this is a high-level marketing
23 piece. We went through it yesterday, and then this other
24 one, you'll remember this on the screen, I have to get to
09:15:06 25 the first page, likewise.

1 They're ad pieces, right? Here they are.
2 Okay. And you can read them. You can take them back,
3 314 and 617, and you can read the first couple sentences.
4 You can read the whole thing. These are ad pieces, okay.
09:15:26 5 And remember, the American Express one is about a
6 different product, Business One American Express Edition.
7 Okay?

8 But Judge Nugent read to you the parts of
9 these documents that the Plaintiffs are focused on.
09:15:42 10 Okay? It's just three sentences, and it's -- I'm reading
11 from what the Judge read to you yesterday. Okay?

12 And in 314, which is the Business One
13 Brief, the supposed statement is, "The solution helps
14 emerging businesses from those with 10 to several hundred
09:16:00 15 employees to streamline their operational and managerial
16 processes."

17 And then there's two documents in 314.
18 They're both kind of stapled together, which is a mistake
19 by Hodell, but whatever. There's two documents.

09:16:15 20 The second one says, "Whether you have 5
21 employees or 500, the solution helps emerging businesses
22 streamline their operational and managerial processes."

23 And the third one is, "Business One
24 effectively supports companies with as low as ten and as
09:16:28 25 many as several hundred employees."

1 Okay? That's it. That's what's in this
2 case. They're true statements. Business One is a great
3 product. We have sold 40 or 50,000 copies of it. That's
4 40 or 50,000 customers.

09:16:45 5 We had Dan Kraus, Paul Killingsworth, other
6 SAP witnesses come in here and explain it's a dynamite
7 product. We've sold it to lots of companies with
8 success. This is a 26 -- 26 pages. A number of them
9 have several hundred employees. A number of them have
09:17:06 10 more than 500 employees.

11 Okay. And here's what they didn't do.
12 They didn't come in and prove that Business One can't do
13 these things. Right?

14 Remember, the statement says, and you can
09:17:21 15 look at them, that Business One can help companies with
16 one to several hundred employees. Business One can help
17 companies with one to 500 employees. If you're going to
18 challenge that statement, you need to come in and prove
19 that it's false. You need to bring someone in who says,
09:17:35 20 "Oh, it can't do that," okay? They didn't even try and
21 prove that. Probably because they thought other parts of
22 their case were going to survive. It was never a focus
23 of the case.

24 What they did is they came in and said, "It
09:17:49 25 doesn't work for us." Stop right there. These marketing

1 materials are marketing materials. They're not directed
2 to Hodell. I talked about that yesterday. It's not a
3 proposal or a letter to Hodell. It's not specific to
4 them. And it's not specific to their complex solution.
09:18:06 5 B1, Radio Beacon and In-Flight.

6 Okay. So if they're going to try and prove
7 that these are false, they need to put that proof on,
8 which they never did, and they're trying now to backfill,
9 but it was never directed specifically to Hodell. And
09:18:25 10 they had a unique solution to begin with.

11 There's no way you can make this get a firm
12 conviction that that's a false statement, okay?

13 But then there's intent to mislead. You
14 got to have a firm conviction of that, too, which is
09:18:44 15 impossible. SAP wanted this to succeed. We don't -- we
16 haven't built the business that we built, and we haven't
17 built the successful Business One product that we built,
18 by hitting and running. We want things to work. We
19 expected this to work.

09:19:02 20 There's been no proof that these statements
21 were somehow created with an intention to mislead people.
22 There's zero proof of that. And then I talked about this
23 yesterday, justifiable reliance. There's no way -- their
24 case is that you need to find -- you can find clear and
09:19:22 25 convincing evidence that a reasonable person would look

1 at those three sentences, buried in those marketing
2 documents from 2003, and say, "I'm good to go on Business
3 One. I'm just going to -- I'm just going to do it."
4 Okay?

09:19:37 5 We know that it's dealer talk. Trade talk.
6 The Judge explained to you, you need to take that into
7 consideration. And look who the reader is. It's Hodell.
8 Remember the e-mail I showed you yesterday? They have
9 been around the barn. They know ERP. Okay? They've had
09:19:53 10 FACTS. They almost got in litigation about FACTS. They
11 know there are issues. They know that "Users" isn't the
12 same as "Employees."

13 They had 160 employees with FACTS and they
14 only had a hundred users. They know that doesn't mean
09:20:08 15 the same thing.

16 They know that they have a complex
17 three-part solution with B1, Radio Beacon, and IFE on the
18 top. And they know these documents are from 2003, those
19 are the dates on them. They didn't buy our
09:20:24 20 software -- I'll try not to trip -- they didn't buy our
21 software until 2005.

22 Okay?

23 And we looked at the documents that their
24 guys, Dale and Dan, had from 2005 that showed the lower
09:20:40 25 numbers. Remember those from yesterday? The Sweet Spot

1 and all of that? You can't say, "Oh, yeah, here's what
2 I'm going to do. I'm just going to make this decision
3 based on these couple of sentences buried in these
4 marketing documents from a two years ago, even though all
09:20:58 5 of these other things in the universe exist."

6 You can't do it.

7 A couple things, and then I'm wrapping it
8 up. This point is on credibility. Give me a second to
9 get organized. Counsel for Hodell came in here yesterday
09:21:34 10 and said that Paul Killingsworth was a puppet on a
11 string. And she repeated that over and over. Right?

12 You saw Paul Killingsworth. He's not a
13 puppet on a string. But I want to talk about something.
14 The basis of the suggestion that Paul Killingsworth was a
09:21:53 15 puppet on a string was that he falsely testified that
16 dealers don't have the authority to make representations
17 on behalf of Business One. Remember that? If you up his
18 testimony, he testified at one point these dealers, they
19 don't have the authority to make representations on
09:22:14 20 behalf of SAP.

21 And Hodell thought, "Well, that's a lie and
22 this guy's just selling the SAP story" and her point was
23 that they later got him to back off of that. And I want
24 to show you, take a look at 316, please. It's right in
09:22:36 25 the agency paragraph. Scroll down. What is it, 4.1? I

1 can't see it. Hang on. You got a copy of 316?

2 Okay. I was right. It's Section 4.1.

3 Blow it up, please. Look at the second sentence. "The
4 SAP reseller is an independent company, person, or entity
09:23:36 5 with no authority to bind SAP or to make representations
6 or warranties on behalf of SAP."

7 So this whole story that you were told
8 about this guy's a puppet on a string, he says -- he'll
9 say anything for SAP. He even says, "dealers can't make
09:23:56 10 representations." Paul was right. Paul knows his job.
11 Paul knows how this works. These people aren't our
12 agents. They're not allowed to make representations that
13 bind SAP.

14 And he later said they are allowed to speak
09:24:15 15 about the product. Of course, they are. His point was
16 he knows his contract. The whole point of trying to rip
17 him and calling this man a puppet on a string when
18 actually he actually knows his job and this case better
19 than you do. Just takes that whole idea and just tears
09:24:31 20 it away.

21 And I'll show you another example very
22 quickly. That next exhibit, Bob. I think it's 437. And
23 it's related, because this is Paul writing. Okay? We've
24 seen this exhibit repeatedly from Hodell. Look at the
09:24:54 25 last two sentences, last two sentences.

1 Take the second-to-last sentence of the
2 third-party paragraph. Hodell likes to repeat in this
3 case that Paul wrote in May of '07 that the
4 product -- no, no, the next sentence, please -- that the
09:25:11 5 product with the additions of In-Flight and Radio Beacon
6 is an outstanding business solution for you and your
7 company.

8 And this is back to, hey, you know, did we
9 keep secrets and were we reporting to them what was going
09:25:23 10 on, et cetera, et cetera. One of the things they like to
11 say is not only did we not tell them what we thought, but
12 we lied to them in the early days and told them, "Oh,
13 Business One is awesome. There are no issues with it."

14 And they refer to this sentence and it's
09:25:38 15 come up a couple times, and I want to just dispel this.
16 Okay? Look at this sentence and look at the one after
17 it. "Functionally, the product with the additions of
18 In-Flight and Radio Beacon is an outstanding business
19 solution for you and your company."

09:25:55 20 Business One is a great product, okay, but
21 even in March, '07, when they were having go-live
22 problems, there's no question that functionally Business
23 One was a totally solid product even for Hodell.

24 Functionality is just does it do the right
09:26:10 25 things? Does it do all of the things that you want it to

1 do? Hodell's never had a beef with functionality.
2 Hodell's beef has been with performance. And that's the
3 point that Mr. Killingsworth makes in the next sentence.

4 "The issue we face today is solely the
09:26:27 5 performance problem we are experiencing with your
6 installation."

7 Yes. Functionally, it's a solid product.
8 Hodell, you seem to be having some problems. They cite
9 to this as oh, here's SAP lying again. Here's SAP saying
09:26:43 10 right after the Udi Ziv e-mail that B1 is great, they're
11 feeding a different story to Hodell than they have
12 internally. It's just not true. Paul is making two very
13 honest and open statements.

14 Functionally, everything is fine. We have
09:26:56 15 to deal with performance. Which again, we did and it
16 improved. They should have stuck with it.

17 So I'm wrapping up. Counsel for Hodell,
18 they're going to get a last chance to speak. That's how
19 this works. They go, I go, then they go again.

09:27:16 20 Here's something that they cannot change,
21 and it's what I told you in the beginning. There are no
22 SAP misrepresentations in this case. Even when you
23 shrink it down to these three little things, in fact
24 especially when you shrink it down to these three things,
09:27:39 25 we have the whole history of this case has boiled down to

1 those couple little things; there are no SAP
2 representations.

3 If anybody -- and this is right from what I
4 told you at the start of this argument yesterday -- if
09:27:52 5 anybody made a mistake, if anybody did something that
6 they shouldn't have -- did something they shouldn't have
7 or could have done something more but didn't, it was
8 Hodell or their guys, Dale or Dan. And Business One, at
9 the end of the day, was a good product for them and it
09:28:10 10 improved and they should have stuck with it.

11 And they don't have any damages, and I
12 don't have any problem looking you right in the eye and
13 telling you when you get back in the jury room, this is
14 not hard. It's not hard. There was no fraud. However
09:28:28 15 that verdict sheet is set up, you're going to indicate
16 that there was no fraud because we know there wasn't, and
17 no way in a million years is there clear and convincing
18 evidence of it. Check the box. We're done. And we
19 could all go back to our lives.

09:28:42 20 Thank you very much.

21 THE COURT: Thank you, Mr. Miller.

22 You may conclude the argument.

23 MS. LUARDE: Well, I think

24 Mr. -- Mr. Miller and I can agree on one thing and one
09:29:14 25 thing only, and that is how much I appreciate you being

1 here for the past few weeks and listening to all this
2 testimony.

3 I can say other than that, we agree on
4 absolutely nothing. There's a lot to address given the
09:29:59 5 last, I don't know, almost four hours of argument that
6 you've heard. I promise to you I'm just going to hit the
7 highlights. I promise to keep this as short as I can and
8 aisle ask my colleagues over here to cut me off if they
9 think I'm going too long.

09:30:14 10 The first thing I want to talk about is
11 this: SAP has come in here, and Mr. Miller has said that
12 they had no idea about Hodell-Natco until 2004. And
13 that's a lie. And we know that's a lie because
14 Ms. Vitantonio got up on that stand and she told you she
09:30:34 15 met with Otto Reidl. And in the fall of 2003, her
16 technical people took down information, took down
17 details, and they called SAP to help her size that
18 product.

19 And why did they do that? Because this was
09:30:48 20 the first sale for her of Business One in the United
21 States.

22 The technical people at SAP knew all about
23 Hodell-Natco in the fall of 2003. They knew the details
24 of the sale.

09:31:05 25 Mr. Miller was absolutely wrong when he

1 made that statement to you. And I want to pull up her
2 testimony on that.

3 Kim has got that up for us. Here we have
4 Ms. Vitantonio talking about the discovery meeting that
09:31:23 5 she had. The questioning by my colleague. "Do those
6 technical people then interface with people at SAP as
7 part of the discovery process to make sure, hey, this is
8 a customer that could be satisfied by Business One?"

9 Her answer, "Yes." Clear, unequivocal,
09:31:48 10 "Answer: Yes."

11 They told SAP all about Hodell-Natco in the
12 fall of 2003.

13 And I just want to be clear, did those
14 technical people then interface -- go to the next
09:32:01 15 page -- for sizing, sizing, to size it properly? They
16 called SAP to size the product properly.

17 SAP knew about Hodell-Natco in the fall of
18 2003. Mr. Miller is not being truthful.

19 If you could go to the next page, Kim. Do
09:32:23 20 you have all of it? Okay.

21 SAP knew about Hodell-Natco in 2003. We
22 didn't sign the license agreement until 2005, two years
23 later. They knew about Hodell-Natco, and in 2005, they
24 accepted and provided 120 user licenses to Hodell-Natco.

09:32:53 25 And guess what? They knew. At that point

1 in time, they knew Business One would never, ever work
2 with 120 user licenses. How do we know that? Let me
3 show you.

4 In 2005, in September, 2005, this testing
09:33:34 5 was performed in Israel. Israel, where Business One was
6 developed. Udi Ziv, in charge of that development team,
7 they did this testing. They knew before they accepted
8 payment for 120 licenses, they knew 30 was the highest.
9 That's what they knew. Yet, they turn around and they
09:34:02 10 give us 120 licenses?

11 They buried their head in the sand, and
12 they did it because they wanted to make the sale. That's
13 what this is all about. They knew this. They knew we
14 had too many items. They knew this. Penny Vitantonio
09:34:22 15 told them. She told them in 2003 we had 150,000 SKUs.
16 They knew that.

17 They knew how many customers we had.
18 Ms. Vitantonio told them that in 2003. Her testimony was
19 clear. It was clear on that point. And you know what?
09:34:43 20 Right now, she even works for SAP, but she was clear on
21 this. She picked up the phone, her technical people
22 picked up the phone and called.

23 And my client believed and had every reason
24 to believe that Business One would work for them based on
09:35:02 25 the representations, the marketing literature, and based

1 on conversations with Penny Vitantonio.

2 The Judge is going to instruct you on the
3 law, but I have to tell you, if you don't know the
4 parameters of what you're selling, and it's very clear
09:35:25 5 throughout everything we've seen in this case, if you
6 don't know what you're selling, and it turns out that you
7 mis-sold something because you didn't gather all the
8 information you needed in order to properly make the
9 sale, that's fraud. And that's what happened here.

09:35:44 10 Israel knew exactly what's going on. The
11 United States, brand new to the market, they just wanted
12 to get out there, they wanted to make sales, they wanted
13 to get their commission. That's what this is about.

14 SAP knew the product would never work
09:36:02 15 before those license agreements were ever delivered.

16 Now, we talked a bit about credibility
17 issues and, you know, Paul Killingsworth. Paul
18 Killingsworth got up on that stand and initially said
19 "Hey, guess what? Our channel partners aren't allowed to
09:36:26 20 make representations. That's what our agreement says."

21 SAP is great at hiding behind their
22 agreements. They're hiding behind their agreement with
23 the developers. They're hiding behind their license
24 agreement with the end users. They rely solely -- the
09:36:42 25 testimony was they rely solely on channel partners to

1 make representations.

2 And Paul Killingsworth got up there and
3 said, "Oh, they're not allowed to make representations."
4 And he backed off that testimony. You saw that yesterday
09:36:56 5 when we pulled that up.

6 He backed off that. In fact, his early
7 testimony is, "All they were able to do is go to trade
8 shows and demonstrate the product."

9 You don't make any sales just by
09:37:09 10 demonstrating the product. And Ms. Vitantonio, she
11 was -- she said, "Yeah, we had to make representations."
12 Geoff Ashley, "Yep, got to make representations."

13 But Paul Killingsworth? Puppet. He
14 changed his testimony up there on that stand. He changed
09:37:27 15 his testimony.

16 I want to talk a little bit about Otto
17 Reidl, and Otto Reidl is an honest man. And opposing
18 counsel has done their best to eviscerate his
19 credibility. And one of the things they did is they took
09:37:50 20 this document from November, 2005 and they waved it in
21 front of you and said, "Hodell-Natco knew back in 2005,
22 based on this document, that Business One could not
23 support them. Otto Reidl testified to that fact in his
24 deposition."

09:38:12 25 Kim, if you could pull up Exhibit Number 5.

1 Here's the document we're talking about, and, Kim, go to
2 the bottom. November 1st, 2005. This is the only
3 document like this in the case, by the way.

4 Down here at the bottom, you see the Bates
09:38:31 5 label, Kim? Could you do the whole bottom, please?
6 HODL00494. What that means, that's a document Hodel had
7 in its records that it produced in this case.

8 During the course of the litigation, Otto
9 and his team had gone on the Internet to see what was
09:38:55 10 going on with Business One, and they found this document,
11 well after November 1st, 2005. And how do we know it was
12 after November 1st, 2005? Because the comments at the
13 bottom, you'll see the last postdate, November 27th,
14 2007.

09:39:18 15 Otto Reidl could not have had that
16 document. He could not have seen that document November,
17 2005, because of that comment on there that says
18 "November 27th, 2007."

19 So what happened? Otto gathered his
09:39:36 20 materials. He looked at the materials because that's the
21 kind of person that he is. He looks at what he's doing.
22 He pays attention to what he's doing.

23 He gives these documents to counsel. They
24 go to SAP.

09:39:49 25 Fast forward to the deposition.

1 He's asked a question: "Did you ever see
2 in 2005 anything about Business One? You know, maybe I
3 did see something."

4 They pull this article out, and he was like
09:40:04 5 "Yes, I did see that then."

6 He went back and took a closer look at the
7 document and he realized, "I couldn't possibly have seen
8 it then."

9 And he came in here and he tried to clarify
09:40:15 10 his testimony on the stand, but Mr. Miller and Mr. Star
11 just want to beat him up over this document saying that
12 he saw this in November, 2005. And there is no way, no
13 way he could have seen that in November, 2005.

14 But that's the kind of people we're dealing
09:40:31 15 with. That's what SAP is about. They manipulate their
16 documents.

17 And let's talk about another document that
18 they have manipulated. Exhibit 700.

19 They have waved this up in this case and
09:40:47 20 they're saying look at how many users -- customers we
21 have with over 500 users.

22 And I remember very vividly the questioning
23 about L'Oreal. L'Oreal, wow, they must have a lot of
24 product. They must have a lot of different shades of
09:41:06 25 lipstick, a lot of different colors of blush. They have

1 a huge inventory. If this is one, you know, they're on
2 the list, they're using Business One. Don't be fooled.
3 They're misleading you. This document doesn't say
4 anything at all about the number of Business One ERP
09:41:26 5 installations at L'Oreal. It doesn't.

6 They could be running dozens of separate
7 independent ERP systems that total up to this number of
8 users. And make no mistake, SAP, this is from their
9 database. They selected the fields they wanted to
09:41:48 10 include on this document. They could have included a
11 field to show the number of ERP installations, but they
12 didn't. Why? Because it doesn't help them and they know
13 it. They know that. This document tells you absolutely
14 nothing.

09:42:05 15 In fact, I have to say if that document is
16 true and you can have 1600 people on one Business One
17 installation, one Business One ERP system, why was there
18 "stunned silence" on that April 17th call? Why would
19 Dirk Boessmann say, "You're at the high end of the users
09:42:37 20 with 120"? Does that make any sense to you? It doesn't
21 to me.

22 They want it both ways. There is no way
23 that list is accurate. It's just not.

24 In fact, in addition to the "stunned
09:43:01 25 silence" phone call, why would Udi Ziv, the developer of

1 Business One, the guy who reports to the Board of
2 Directors, say it's beyond any sane B1 Sweet Spot, 120
3 users? Why would he ever write that if that list is true
4 and can support 1600 users on one ERP system? It's
09:43:34 5 because that list is a lie, and don't believe that.

6 In fact, during the life of this case,
7 we've seen e-mail after e-mail after e-mail where
8 Business One was mis-sold, multiple SAP employees wrote
9 that. Multiple. And multiple SAP employees have written
09:43:57 10 how the system didn't work at Hodell, and SAP is running
11 away from all of that.

12 And they want you to believe a whole new
13 story here, a whole new story about how Business One is
14 so great and can support this number of users. Why?
09:44:12 15 Because the marketing literature that they put out, the
16 statements made by Penny Vitantonio to my client, were a
17 lie. And they're trying to get out from under this case.

18 And I have to tell you the fact that SAP is
19 now claiming that the system worked is absolutely
09:44:40 20 stunning to me. Absolutely stunning. I want you to
21 think about this. So you remember in October, you know,
22 Eddy Neveux did a test and he said it was nine seconds,
23 right? Nine seconds was the lag time. And I heard a lot
24 about well, you know, you go on to Amazon, you order a
09:45:00 25 book or a record or movie or whatever you're going to

1 order, you know, that's not very long.

2 Let's think about it in the business
3 context. So pretend I'm at Hodell, phone rings, I pick
4 it up. "Hello, Hodell-Natco. Hey, Sharon, we need to
09:45:16 5 order some parts. Okay, Mr. Miller, let me pull that up
6 on the system. Let me find you on my computer. Click,
7 one, two, three, four, five, six, seven, eight, nine.
8 Oh, there you are. Okay. Which address would you like
9 that shipped to? Oh, I'd like it shipped to, you know,
09:45:46 10 the St. Louis address. Okay. Let me enter that. Click,
11 one, two, three, four, five, six, seven, eight, nine.
12 Okay. What would you like? Oh, I'd like 50, 50 bolts.
13 Okay. Click, one, two, three, four, five, six, seven,
14 eight, nine. Okay. Would you like something else?
09:46:23 15 Yeah, I think I need, you know, I need some chain, too.
16 Okay. Click, one, two, three, four, five, six, seven,
17 eight, nine. Would you like something else? Yes, I
18 would. I'd also like some fasteners. Okay. Click."

19 MR. MILLER: Your Honor, I object.

09:46:53 20 MS. LUARDE: On and on and on.

21 THE COURT: Objection sustained.

22 MR. MILLER: There's no testimony --

23 THE COURT: Objection sustained.

24 MR. MILLER: Thank you.

09:47:00 25 MS. LUARDE: Actually, Joe Vislocky

1 testified every time you had to go to a dropdown, that
2 there was lag time. And that's what I was describing was
3 the amount of lag time every single time they had to move
4 through their system and go through a dropdown.

09:47:15 5 MR. MILLER: Objection. Same objection,
6 Your Honor.

7 THE COURT: Objection sustained.

8 MR. MILLER: That's not the testimony.

9 MS. LUARDE: That was the testimony.

09:47:19 10 THE COURT: Excuse me. I don't want you
11 two arguing.

12 You remember what the evidence was.

13 MR. MILLER: Thank you, Your Honor.

14 MS. LUARDE: In fact, Jaime Clarke
09:47:31 15 testified, Joe Vislocky testified about all of the
16 problems with Business One.

17 You recall Jaime Clarke talking about the
18 hour glass circling? How that hourglass continued to
19 circle?

09:47:52 20 You heard Joe Vislocky talk about problems
21 with the dropdown situation. That's all evidence in the
22 record.

23 You heard Kevin Reidl talk about problems
24 with the system. I mean, there were serious performance
09:48:04 25 issues at the company.

1 What does SAP do? SAP is blaming In-Flight
2 and Radio Beacon for the problems, in particular
3 In-Flight. And who do they rely on for that? They rely
4 on Joe Guagenti. Joe Guagenti came in here and he got on
09:48:25 5 the stand, and he testified on direct, and it wasn't
6 until cross-examination that you actually learned that
7 Joe Guagenti is still in a working relationship with SAP.

8 SAP paid for him to come in here, paid for
9 him to testify. And during the course of his testimony,
09:48:45 10 he admitted on the stand that in an e-mail to Eddy Neveux
11 that he was not being honest to Eddy Neveux. He admitted
12 on the stand that he was lying in an e-mail to Eddy
13 Neveux.

14 He also admitted that he went to
09:49:02 15 Hodell-Natco, he sat there, he knew there were all these
16 problems with In-Flight, but he never told anyone at
17 Hodell-Natco. He's not believable. He's not
18 trustworthy.

19 Who is trustworthy? Helmuth Guembel. You
09:49:23 20 know, Joe Guagenti wants to say it was all In-Flight; it
21 wasn't Business One. I'm here to tell you Helmuth
22 Guembel, the man who has turned down SAP and said, "I
23 can't work for you right now because I'm working on this
24 case with Hodell-Natco and there is a conflict," the man
09:49:43 25 who has worked for years with SAP, the man who was paid

1 close to a million dollars for consulting with SAP, he
2 came in here and he was unequivocal that the problem
3 Hodelle experienced was with Business One performance.
4 Business One was the problem. And he went through all of
09:50:04 5 his testimony about the architecture, the DI API, the 32
6 byte versus 64 byte. That's the person to believe.

7 And look at Helmuth's credentials compared
8 to Joe Guagenti. Based on that alone, who really knows
9 what they're talking about? Helmuth Guembel, the man
09:50:25 10 with all this experience on ERP systems? Yeah, he's the
11 guy. He's the person to believe; not Joe Guagenti, the
12 guy who lied to Eddy Neveux.

13 One thing that also is really interesting
14 about that is that, you know, we've talked a lot about
09:50:45 15 the testing, and in the almost four hours of closing
16 argument, Mr. Miller didn't say a single word about the
17 IBM study. The IBM study that they relied on to support
18 their position, they ran away from it after Helmuth
19 Guembel testified that by performing that mathematical
09:51:09 20 calculation, the number of concurrent users Business One
21 could support was 58.

22 They didn't say a single word about that
23 after -- that document disappeared. It was gone. Not a
24 single word after that. And in closing, almost four
09:51:27 25 hours of closing, not a word because Helmuth is right.

1 That document, when you do the math, it's 58. And that
2 proves what they're saying in their marketing literature
3 is a lie.

4 What Penny Vitantonio told my client that
09:51:49 5 it could support -- she was going to sell a hundred
6 licenses -- it's a lie. And SAP knew it. They knew it
7 from their own internal testing. They knew this.

8 You know, it's interesting, Mr. Miller says
9 that we don't have a case. "Oh, the case has shrunk," we
09:52:20 10 don't have a case. I submit to you after seven years, my
11 client has pursued this case to be here today for seven
12 years, and if Judge Nugent believed we didn't have a
13 case, we wouldn't be standing here in front of you.

14 We have a case, and we have a good case
09:52:37 15 because SAP, in their marketing literature and through
16 Ms. Vitantonio, told my client that Business One will
17 work for them.

18 And it was a lie.

19 And SAP Israel with the testing and the
09:52:53 20 information they had, they knew it was -- they knew it
21 was a lie. They rushed to market in the United States.
22 They were making sales. They were selling anything they
23 possibly could with utter disregard for who was buying
24 the product.

09:53:08 25 I want to talk -- mention one more thing

1 about this April 17th phone call where SAP claims that
2 they were straight with Hodell, that they told them, you
3 know, Business One -- I'm not sure now what they're
4 claiming they told them. I thought it was that Business
09:53:47 5 One wasn't going to work, but I'm not sure at this point
6 what they claim they're actually telling them.

7 But here's my point. If they were straight
8 with Hodell on that call, why would Dirk Boessmann write
9 an e-mail later? Dirk Boessmann, who was the guy on the
09:54:03 10 phone, the guy doing the talking for SAP, why would he
11 later send an e-mail saying "It's now time to be honest
12 with the customer"?

13 If Dirk Boessmann thought they were honest
14 on that April 17th call, why would he later send that
09:54:16 15 e-mail? It doesn't make any sense. And, in fact, why
16 would Kevin Reidl -- and if you could pull up Exhibit
17 84.2, Kim -- and this is an e-mail to Dan Lowery.

18 He said, "We never heard back from you or
19 SAP regarding the large number of users we have in SAP
09:54:52 20 Business One and whether that could be a factor in the
21 performance problems we're experiencing. In the
22 conference call we had last week, we were to hear back on
23 this."

24 He goes on, "What exactly is the range in
09:55:05 25 number of users that Business One is designed for? We

1 were told up to 500 users when we bought the package, but
2 we heard in the conference call that we were pushing the
3 high end of the package with approximately 115 users
4 currently."

09:55:19 5 If he had told the truth on that call, why
6 would he be sending that e-mail? Why would Dirk
7 Boessmann later write, "It's now time to be honest with
8 the customer"? It's because that information was never
9 conveyed on that call, and it wasn't conveyed until
09:55:34 10 November of that year.

11 I want to talk for a minute about the
12 instructions you're going to receive on fraud, and I'm
13 grabbing my notes because I want to make sure I get this
14 right. The Judge has prepared these instructions and
09:56:09 15 he's read them to you on specific elements of fraud, and
16 I want to tell you how we've satisfied every one of these
17 elements.

18 The first thing we need to show is a false
19 representation. And what we have are a couple of
09:56:55 20 Exhibits 314, 617, and we have Ms. Vitantonio.

21 I want to look at the documents first. You
22 can go back and I'm sure you're going to look at these
23 materials, but I want to point out a few things to you.

24 First of all, they want to say, SAP wants
09:57:12 25 to say this is all puffery. All nonsense. It's like

1 saying we have the world's best pizza. I think that was
2 the analogy that was given.

3 This is nothing like saying we're the
4 world's best pizza. In this marketing literature and in
09:57:31 5 these documents and in the comments made by
6 Ms. Vitantonio, they were very, very clear about the
7 number of users, and they were also very clear about a
8 lot of different things, but it's not just the number of
9 users. The instructions actually say we relied on the
09:57:48 10 entire content of these documents, but in particular the
11 user count.

12 MR. MILLER: Objection, Your Honor.

13 THE COURT: Overruled.

14 MR. MILLER: The word user count is out --

09:57:55 15 THE COURT: Excuse me. Excuse me. The
16 jury will remember the evidence and look at the
17 documents.

18 MS. LUARDE: This is an SAP AG publication,
19 and, in fact, it says, "The solution helps emerging
09:58:11 20 businesses from those with 10 to several hundred
21 employees to streamline their operational and managerial
22 processes."

23 I submit to you even if it says 10 to
24 several hundred employees, that's a false statement
09:58:25 25 because Hodell-Natco fit within that parameter, and

1 Business One did not work.

2 But the reality is, there's no other
3 comment in this document about users. And it's
4 reasonable to assume, if you're looking at purchasing
09:58:42 5 software, when you read a statement like that, that it
6 means users.

7 There's also information in here
8 about -- very specific statements, very specific things
9 about the benefits that you receive. This isn't just
09:58:59 10 marketing literature. This isn't just saying, "We have
11 the world's best pizza." This is very specific. It has
12 very detailed points in here about comprehensive
13 financial expertise, management control, intuitive user
14 interfaces, enhanced productivity and control,
09:59:19 15 unparalleled ease of use, new opportunities for success,
16 global reach, unmatched expertise.

17 This isn't "This is the world's greatest
18 pizza."

19 The next document, the SAP solution brief,
09:59:36 20 the same thing. "Whether you have five employees or 500,
21 the solution helps emerging businesses streamline their
22 operational and managerial processes."

23 This is very specific about the number of
24 employees, which we took to mean the number of users.

09:59:53 25 But again, even if it's the number of employees, it

1 doesn't work. It's a lie. This document, again, very
2 specific. "Operational support, intuitive user
3 interface, scalability for dynamic businesses. Supported
4 by SAP's global resources."

10:00:15 5 All of these documents were prepared by SAP
6 AG and distributed by SAP America.

7 We also have Ms. Vitantonio, and the AmEx
8 materials. It's the same thing. Very detailed
9 information about the product. It talks about support,
10:00:43 10 easy solutions, financing program. You put financing
11 information in marketing materials. New solutions for
12 small and midsize businesses. Importantly here, "The SAP
13 Business One Solution effectively supports companies with
14 as few as 10 and as many as several hundred employees."

10:01:09 15 Again, you know what? We didn't just rely
16 on this information. We had meetings and calls with
17 Ms. Vitantonio, and Ms. Vitantonio admitted in her
18 testimony that she discussed scalability with Otto Reidl.

19 And we've heard Mr. Miller say there's not
10:01:32 20 a single written note saying the number of users, but
21 guess what? We have written notes from Otto Reidl in a
22 meeting with Ms. Vitantonio where scalability was
23 discussed.

24 And Kim, if you could put that up. 827.

10:01:59 25 December 19th, 2003. Don't blow that up

1 yet. Penny Vitantonio, telephone call. Down here, could
2 you highlight that, please?

3 "Scalability." We know what that meant to
4 Otto Reidl. He was very clear that SAP Business One had
10:02:27 5 to be able to accommodate Hodell-Natco's growth. It had
6 to scale to their growth. And Hodell-Natco, for the last
7 13 years, grew through acquisition and added users.

8 And Otto Reidl, in his notes, in his
9 handwriting, states "I discussed scalability with Penny
10:02:49 10 Vitantonio on December 19th, 2003."

11 She admitted it. And yet, despite that
12 conversation, knowing that it is scalability, scalability
13 was important, a proposal was submitted by AmEx to
14 Hodell-Natco, and that's because everyone was on board.
10:03:24 15 Otto Reidl and Hodell-Natco believed the system would
16 work. Penny Vitantonio, after discussing the needs with
17 SAP, believed it would work. Scalability was discussed.

18 Mr. Miller, that wasn't true.

19 So these are the false representations that
10:03:53 20 were made. It was represented to my client in marketing
21 literature, in that literature that I just showed you.
22 That's very specific. It's not puffery. It's not "The
23 world's greatest pizza." It's very specific on details
24 as to what Business One can do.

10:04:15 25 They also discussed this with

1 Ms. Vitantonio, who took that information back to SAP,
2 and SAP said it would work. And we have these notes from
3 Otto Reidl where he discussed scalability.

4 There were false representations made in
10:04:33 5 this case that led my client into entering an agreement
6 to purchase Business One.

7 The next element is was this material to
8 the transaction at hand? Absolutely. I don't think
9 anyone can really dispute the criticality of scalability
10:05:01 10 for Hodell-Natco. That was key for them. That testimony
11 hasn't even been disputed. That was key for
12 Hodell-Natco. They had to have a system that could
13 accommodate their growth. It was material to their
14 decision-making.

10:05:14 15 Intent. Intent can be inferred from all
16 the surrounding circumstances. And I want to submit to
17 you that again, there's documentation, and you'll have
18 all these documents with you, but Business One, this sale
19 to Hodell-Natco, was a big deal. It was a big deal for
10:05:40 20 SAP. It was, I think the notes were by Geoff Ashley,
21 where "This was the largest sale in Business One
22 history."

23 We also know that SAP wanted to get into
24 the vertical market industry; that they wanted to have
10:05:59 25 this add-on developed so they could go out and sell to

1 other companies like Hodell.

2 This was important for their sales team.

3 Hodell-Natco was a big deal for their sales team. They
4 wanted this sale.

10:06:18 5 SAP says, "You know what? If we wanted to
6 quit Hodell, why didn't we just sell them a bigger
7 product, a more expensive product? Why didn't we just
8 put them in A1?" They knew Hodell-Natco would not go
9 forward with an A1. They didn't have the budget for it.

10:06:42 10 So they needed to sell Business One.

11 Justifiable reliance. That's the next
12 component. Yeah, we had Penny Vitantonio saying, "This
13 is going to work for you." And she gave them a proposal
14 because she was told by SAP this is going to work for
10:07:08 15 them. That's what happened.

16 We're allowed to rely -- aren't we allowed
17 to rely on their channel partners? Because SAP doesn't
18 sell directly. There's no one else to rely on. And AmEx
19 was a Business One channel partner. We're allowed to
10:07:26 20 rely on the statements that they made.

21 And she said this is going to work, and she
22 gave them a proposal.

23 We're also allowed to rely on these
24 detailed documents they provided. I mean, if we're not
10:07:38 25 allowed to rely on them, why are they sending them out?

1 Again, detailed statements about the benefits of Business
2 One. It's not "The world's greatest pizza." These are
3 detailed documents.

4 Injury. Yeah, Business One, the base
10:08:02 5 product, was the problem. Helmuth Guembel was clear on
6 that front. They want to say it was the infrastructure,
7 that the hardware was bad. And you heard Joe Vislocky on
8 the stand. Joe Vislocky came in and testified, "I didn't
9 see any of that silver slinky stuff. I didn't see any of
10:08:24 10 that."

11 SAP's counsel tried to beat him up saying,
12 "Well, you went in and you upgraded things. Yeah, I did.
13 I mean, that's what you do. I mean, you're constantly
14 upgrading, you know, servers. You're upgrading things."

10:08:39 15 But here's what he also said. "It did not
16 change the performance of the system." It didn't. That
17 was his testimony. That's what he said.

18 As for In-Flight being the cause, well,
19 again, you know, Joe Guagenti, Helmuth Guembel,
10:09:04 20 (indicating). I think Helmuth wins. It wasn't
21 In-Flight. It was core B1 product.

22 And even if In-Flight contributed to the
23 slowness, In-Flight was an add-on built on top of the B1
24 product. And you heard Helmuth testify that, you know,
10:09:29 25 it's an add-on, it sits on top of it, but the core

1 problem was Business One. And even if --

2 MR. STAR: Objection, Your Honor.

3 That was not Mr. Guembel's testimony.

4 THE COURT: Again, the jury is going to
10:09:39 5 have to remember their testimony. I told you what the
6 lawyers say isn't evidence.

7 MS. LUARDE: Well, again, I think I'm
8 disagreeing with opposing counsel.

9 In-Flight. Even if you decide In-Flight
10:09:57 10 added to the problem, there's no dispute that Helmuth
11 Guembel said Business One was the problem. That's what
12 Helmuth Guembel said. That was his testimony.

13 And, in fact, Udi Ziv, in his e-mail
14 correspondence, when he said, "Way above any sane B1
10:10:34 15 Sweet Spot," he didn't say anything about In-Flight
16 add-on. He said it was a problem with B1.

17 Testing. Udi Ziv. Udi Ziv knew. This
18 whole time, Udi Ziv, the development team, they knew.

19 I want to talk just for one quick minute
10:11:01 20 about damages, and I'm not going to belabor the point.
21 SAP has come in here with all these charts about gross
22 profit and gross sales per employee.

23 MR. MILLER: Objection.

24 MS. LUARDE: And here we have gross annual
10:11:28 25 sales, gross sales. I would love to bring home my gross

1 pay. I'm sure you would, too. But that's not the true
2 metric of profitability. It just isn't.

3 And they can multiply and divide gross
4 numbers all the they want, but they're still gross
10:11:51 5 numbers. That's not the true measure of profitability.
6 It just isn't. It's smoke and mirrors. That's what this
7 is. It's smoke and mirrors.

8 As for productivity, and our productivity
9 numbers, all you have to do is look at this and you can
10:12:35 10 see the number of pounds that shipped dropped. We were
11 less productive using Business One. And again, I go back
12 to the analogy yesterday. You know, the big old house
13 with the big yard, and you have a lot of people who need
14 to get that lawn cut, and if there's a problem with the
10:13:02 15 lawnmower, it's going to take an awful lot longer, and
16 it's going to take more people during that same period of
17 time to get the job done.

18 And SAP wants to beat us up over not
19 producing a payroll record for a specific employee? This
10:13:21 20 is one that had an impact on the entire company, everyone
21 from Otto and Kevin down to the person in the warehouse.
22 It wasn't just about one employee not being able to do
23 their job. It was about the entire company being ground
24 to a standstill because Business One did not work.

10:13:38 25 That's the issue. Don't be fooled by, "Oh,

1 I have to point to a specific person." All you have to
2 do is look at this chart again, and these numbers are not
3 made up. These are real numbers.

4 In 2004, we shipped 21,532,000 pounds.
10:14:00 5 That's the closest year to 2007. 21,103,000. And when
6 you compare that to the number of employees -- 2004, the
7 number of employees on FACTS, 160; 2007, 186 -- you can
8 see it took more people to ship the same amount of
9 product.

10:14:45 10 I just want to wrap up really quickly and
11 say, you know, you heard all the testimony in this -- in
12 this case, and it's very clear that SAP knew about
13 Hodell-Natco through Penny Vitantonio back in 2003. They
14 knew the parameters. SAP wanted to make this sale, and
10:15:23 15 after -- despite this testing that was done before the
16 sale of the licenses in 2005, SAP took an order for 120
17 users, despite knowing it wouldn't work.

18 SAP buried its head in the sand and allowed
19 this sale to go forward. And SAP is coming in here and
10:15:44 20 hiding behind their contracts and saying they don't have
21 any obligation, they don't have any responsibility. Yes,
22 they do. They lied to my client. My client relied on
23 that to great expense, great cost.

24 And now they're saying to give us nothing.
10:16:09 25 The reality is SAP committed fraud, and my client is

1 entitled to the damages that we discussed yesterday.

2 And I just want you to go back and use your
3 common sense on this.

4 Thank you.

10:16:27 5 THE COURT: Thank you, Ms. Luard.

6 Could you remove those, whoever is
7 responsible for the demonstratives? Thank you.

8 Okay, folks. Now, remember what I said to
9 you yesterday, right, as to the instructions that I gave.
10:17:00 10 I'm going to give some final instructions now, and then
11 the case will be in your hands for your consideration.

12 Now, the verdict in this case must
13 represent the considered judgment of each member of the
14 jury. In order to return a verdict or to answer the
10:17:18 15 interrogatory, if you get there, each juror has to agree.
16 That means that your verdict or your verdicts or your
17 answer to the interrogatory must be unanimous.

18 Now, it's your duty as jurors to consult
19 with one another during your deliberations and to
10:17:35 20 deliberate with a view to reaching an agreement, if you
21 can do so without doing violence to your individual
22 conscience and good judgment.

23 You must each decide the case for yourself,
24 but do that only after a fair and impartial consideration
10:17:50 25 of the evidence with your fellow jurors.

1 Now, in the course of your deliberations,
2 do not hesitate to reexamine your own views, if you're
3 convinced that you may have been wrong. But do not
4 surrender your honest conviction as to the weight or
10:18:06 5 effect of any evidence solely because of the opinion of a
6 fellow juror or for the mere purpose of returning a
7 verdict.

8 Remember that each one of you is equal in
9 the jury room, and each one of you should be given an
10:18:19 10 equal opportunity to present your views as to what you
11 think the state of the evidence is, and then each one
12 should consider the views of your fellow jurors as well.

13 Remember at all times that you are not
14 partisans. You are Judges; Judges of the facts as
10:18:35 15 presented by the evidence in this case.

16 And so your sole interest should be to seek
17 the truth based on the evidence that was presented during
18 the course of this trial.

19 Now, for your convenience and in order to
10:18:46 20 assist you in reaching a proper verdict, I'm submitting
21 to you one interrogatory and two verdict forms. I'm
22 going to display them to you at this point, and I think
23 if I just show them to you, they will be
24 self-explanatory.

10:18:59 25 Now, I have a verdict. The form is just

1 like it is. You'll see it when you go back, but it
2 says -- has the caption here, says "We, the jury, being
3 duly impaneled and sworn, find by clear and convincing
4 evidence in favor of" and then I have a blank space here,
10:19:16 5 and I say next to it "Insert in ink, either Plaintiff or
6 SAP AG, on Plaintiff's claim of fraud in the inducement."

7 You see nine signature bars, and here under
8 the first signature bar I have foreperson and
9 that's -- your foreperson will sign on that signature
10:19:33 10 bar, and the other eight remaining concurring jurors will
11 sign in whatever order you want.

12 And then down at the bottom it says
13 "Dated," of course, the date you sign this document will
14 be inserted there.

10:19:44 15 Below that I have a sentence that says, "If
16 you find in favor of the Plaintiff, answer the
17 interrogatory." And again that will make sense when we
18 get there.

19 Now, the second verdict form, I have,
10:19:56 20 "Verdict as to SAP America," same caption, same thing.

21 It says, "We, the jury, being duly
22 impaneled and sworn, find by clear and convincing
23 evidence," blank space, "insert either Plaintiff or SAP
24 America on Plaintiff's claim of fraud in the inducement."

10:20:12 25 Again, the nine signature bars with the

1 foreperson under the first one, dated at the bottom.
2 Same sentence that says, "If you find in favor of the
3 Plaintiff, answer the interrogatory." Obviously if you
4 find in favor of the Defendant on both, then you don't
10:20:26 5 have to answer the interrogatory, and this will be
6 self-explanatory.

7 Here's the interrogatory. "If you found in
8 favor of the Plaintiff on its claim of fraud in the
9 inducement against either Defendant, what damages has the
10:20:41 10 Plaintiff proven by a preponderance of the evidence?"

11 And then you'll see I have a blank space here and then I
12 have next to it in parentheses, "Insert in ink an amount
13 from zero dollars to whatever you think the evidence
14 requires." Same format, nine signature bars, foreperson
10:20:58 15 signs on the first line and then the other eight
16 concurring jurors sign in whatever order you want.

17 One kind of comment about that, and that is
18 that sometimes jurors will get confused. The foreperson
19 signs on the first line. It doesn't make any difference
10:21:14 20 what order you sign, the rest of you sign, so you don't
21 all have to sign in the same order after that. I kind of
22 make a point of that because we did that one time and the
23 poor jurors were back there going crazy. They kept on
24 asking for different verdict forms because they didn't do
10:21:28 25 it all the same, and we must have had 15 verdict forms in

1 that case. So now I'm kind of clear about that; you can
2 sign in whatever order that you want.

3 Now, it is proper to add the caution that
4 nothing that I have said in these instructions and
10:21:40 5 nothing in any form of interrogatory or verdict form
6 prepared for your convenience is meant to suggest or
7 convey in any way or manner any intimation as to what
8 verdict I think you should find.

9 What the verdict shall be is the sole and
10:21:56 10 exclusive duty and responsibility of the jury.

11 Remember what I told you earlier. The
12 Court has no opinion whatsoever, even despite what the
13 lawyers said during their arguments, on the obligations
14 and the duties which it is your responsibility to
10:22:10 15 determine, which is whether the Plaintiff has proven
16 either one of their claims by clear and convincing
17 evidence; and if they have, whether they have proved any
18 damages by a preponderance of the evidence. The Court
19 has no opinion whatsoever on those issues on which it is
10:22:26 20 your duty to determine.

21 Now, upon your retirement, you should
22 proceed to select one of your members as foreperson.

23 Now, the foreperson has no greater
24 authority, nor any greater responsibility, than any other
10:22:39 25 member of the jury, except the Court charges the

1 foreperson with the responsibility: One, of making sure
2 the verdict forms and interrogatory, if you get there,
3 are signed and dated according to the instructions; and,
4 two, in the event that you wish to make any communication
10:22:57 5 to the Court, that your note is signed by your foreperson
6 and dated.

7 So I'll say that again. And you probably
8 will do this because we may have smokers that want to go
9 out or you may want to go to lunch, so if you communicate
10:23:12 10 with the Court, the note has to be written, could be
11 written by anybody, but it has to be signed and dated by
12 your foreperson.

13 Other than that -- well, and of course, the
14 foreperson, sure, is also charged with the responsibility
10:23:24 15 of confining the discussions in the jury room to the
16 evidence and the law in this case, which makes perfect
17 sense.

18 Otherwise, the foreperson has no greater
19 authority, nor any greater responsibility than any other
10:23:36 20 member of the jury.

21 And as a comment, don't go back and argue
22 for three hours saying nobody wants to be the foreperson
23 because you don't want, like on Law & Order, to walk out
24 and read the verdict because when the verdict is returned
10:23:49 25 here in open court, I will read all the verdicts. Okay?

1 So you don't have to worry about that.

2 Now, regardless of any opinion you may have
3 as to what the law is or what the law ought to be,
4 remember that it would be a violation of your sworn duty
10:24:04 5 to base a verdict on any view of the law other than what
6 I have given in these instructions, just as it would also
7 be a violation of your sworn duty as Judges of the facts
8 in this case to base a verdict upon anything other than
9 the evidence that was presented during the course of this
10:24:22 10 trial.

11 Now, I do hope that these instructions have
12 been sufficiently clear to enable each one of you to
13 perform your duties. If you have a question about these
14 instructions, it should be discussed first in the privacy
10:24:34 15 of your jury room. If you come to a disagreement as to
16 the meaning of an instruction, it may be possible, under
17 certain circumstances, to review those matters by a
18 request to the Court.

19 So if you desire to address any
10:24:47 20 communication to the Court, as I've said, you must reduce
21 your communication to writing, have it signed and dated
22 by your foreperson, and then you can contact the Court by
23 using the push button in the jury room. And I will
24 endeavor to answer your question.

10:25:01 25 And after you have reached a verdict,

1 you'll contact us by using the push button. You'll be
2 brought back here in open court and I will read the
3 verdict.

4 Now, after your verdict is returned and you
10:25:14 5 are discharged as jurors, at that time, you'll be free
6 from the admonition I've been giving you about disclosing
7 or discussing the case. Whether or not you do discuss
8 the case is certainly up to the individual juror because
9 your verdict obviously speaks loudly and clearly to what
10:25:33 10 you think the state of the evidence to have been.

11 Now, I would say this, too, that one more
12 caveat on this from what we see on television. We have a
13 Court rule, and I say this in every case because it's
14 true, we have a Court rule that says that nobody, that
10:25:48 15 means nobody, shall have any contact with any member of
16 any jury unless the Trial Judge gives his or her
17 permission.

18 And I don't give that permission.

19 So you can commence your deliberations,
10:26:02 20 secure in the knowledge that no one will have any contact
21 with any member of the jury about any aspect of your jury
22 service whatsoever.

23 I need to emphasize that because a lot of
24 times I find from people watching the TV shows or
10:26:19 25 actually seeing on the news in different states and

1 different places, people talking to jurors and say how
2 does that happen. I don't know. But in Federal Court,
3 it doesn't happen. Okay? Just so you know that.

4 Now, are there any objections,
10:26:31 5 modifications, additions or deletions that have not
6 already been raised by the Plaintiff?

7 MS. LUARDE: No, Your Honor.

8 THE COURT: By the Defendant?

9 MR. STAR: We have a couple of points to
10:26:40 10 address, Your Honor.

11 MR. MILLER: Can we approach?

12 THE COURT: I should have known, right?

13 (Side-bar conference had off the record)

14 THE COURT: You know, good thing we have
10:28:54 15 these opportunities because I did make an error in the
16 verdict form because in this case, I'm going to change
17 the verdict form so you'll get them back in a minute.

18 The verdict form is going to state in
19 essence we, the jury, in this case being duly impaneled
10:29:10 20 and sworn, find by clear and convincing evidence in favor
21 of the Plaintiff on Plaintiff's claim, either they prove
22 it or they don't. I'll figure it out. Because the
23 Defendant doesn't have to prove anything. Okay? The
24 Plaintiff has to prove their case. The Defendant doesn't
10:29:30 25 have to prove anything. And they pointed that out and

1 it's true.

2 So that's why I said this. So I'll figure
3 out the right way to word the verdict form because I told
4 you the burden of proof is on the Plaintiff. The
10:29:44 5 Defendant doesn't have to prove anything.

6 Okay. I'll take care of that and then
7 we'll get it back to you.

8 Now, the last thing I want to say is that
9 the lawyers are going to get all the exhibits together
10:29:59 10 and we'll send those back to you in a minute or two.

11 First order of business is to elect your
12 foreperson. The other thing is it's 10:30 in the morning
13 on Thursday. And I say this in every case, too, so I'm
14 not singling out you in this case to say it. You take
10:30:21 15 whatever time in your deliberations that you think the
16 evidence and the law requires. I've had cases that
17 lasted for a day, and the jury deliberated for a week.
18 I've had cases that lasted for two months, and the jury
19 deliberated for five minutes.

10:30:39 20 So there's no set amount of time that any
21 jury should deliberate on any case. It's solely up to
22 you to decide what amount of time you think the evidence
23 and law requires you to deliberate. So don't be bound by
24 any internal time constraints that you think there are.
10:31:01 25 All right?

1 The second thing is you've been very, very
2 prompt and cooperative with us. And believe me,
3 everybody appreciates that, but the time, your
4 deliberation time is yours now. And that means that you
5 may deliberate when all nine of you are together in the
6 confines of the jury room.

7 When there's a break for a smoke or you
8 break for lunch or something like that and there are some
9 people in the jury room and some people not, you can't
10 talk about the case. You may talk about the case only
11 when all nine of you are together in the jury room.

12 If you want to take a break, you contact us
13 by writing a note. If you want to go to lunch, you can
14 write a note and tell me what time you want to go and
15 when you want to come back, and we'll let you obviously
16 go and then we'll have you back on L-1 whenever you say
17 you want to come back. All right?

18 If you go to the end of the day and you
19 have not reached a decision, certainly you're permitted
20 to go home. I think the building is closed tomorrow, to
21 be honest with you, so -- I know. Believe it or not, I
22 do have the power to open the building, and that would be
23 a decision for you, all right, to make, or you can come
24 back on Monday if that's what you think, or we can work
25 late.

1 Now, Jeanie is not here. She's on
2 vacation, but she cringes when I say this, but we've
3 actually had juries here up to midnight. If you want to
4 stay afterwards, you can do that, too.

10:32:34 5 What I'm telling you with all these things
6 is you decide the course of your deliberations, and we
7 will follow whatever you say you want to do. I want to
8 make all that clear.

9 And so with that, I'll get -- oh, you'll
10:32:46 10 have a copy of the exhibits to go back with you. I will
11 straighten out my mistake on the verdict forms and get
12 that back to you.

13 We will have the ladies bring in -- maybe
14 the General may carry some of the exhibits back to you,
10:33:01 15 but you may deliberate then only when all nine of you are
16 together in the confines of your jury room.

17 Okay? You'll have a copy of the
18 instructions as well, so if you want to refer to that,
19 you'll have that.

10:33:14 20 I used to tell people at the beginning, you
21 know -- I saw you go, whew. And I used to say at the
22 beginning, and then I found that I lost you during it if
23 you know you're going to get a copy of it, so I wait
24 until the end to spring that on you.

10:33:29 25 Think about this. I'm an old Judge, so

1 when I was a young lawyer and the Judges used to read
2 these charges, I mean, they had papers all over the
3 place. It wasn't done like this in a book that you give
4 to the jury. I often wondered how in the world does the
10:33:43 5 jury ever know what the Judge said? And in those days,
6 half the time they didn't. But now you do.

7 You will have a copy of this with you. If
8 you want to review it, you're certainly welcome to do it.

9 And the one last comment, good luck.

10:33:59 10 (Jury out)

11 MR. STAR: Mr. Reidl finally broke out for
12 us, after he jumped and jived around, saying there were
13 27 extra people, and then they came back and said, "No,
14 really look at the sales and administrative expense
10:35:16 15 line."

16 Here's what Mr. Reidl ended up saying when
17 I asked him just the other day on June 30th. You can
18 find this at Pages 2792 through 93. He's explaining the
19 sales and admin line item, and then below that line are
10:35:32 20 corporate and other corporate charges that include bad
21 debt, advertising, computer maintenance expenses and
22 expenses related thereto. Travel, telephone and
23 telegraph, the independent rep commissions, our auditor
24 expenses, other professional fees and legal expenses.

10:35:51 25 I asked him: "So like your legal fees in

1 this case?"

2 His answer: "Pardon?"

3 I asked him again: "Like legal fees that
4 you have for your lawyers?"

10:36:00 5 "Answer: You bet."

6 That was his testimony.

7 THE COURT: Okay. Well, didn't I give an
8 instruction saying that they can't consider legal fees?

9 MS. LUARDE: Right.

10:36:09 10 MR. STAR: Precisely my point. Precisely
11 my point.

12 They've been given this huge line item
13 entry without a breakdown at all of what's in there,
14 right?

10:36:19 15 This is all they've been told, and we find
16 out just on June 30th that among the things that are
17 within the costs that they're asking this jury to award
18 them are their legal fees for their lawyers in this case.

19 That was his testimony.

10:36:33 20 MS. LUARDE: Your Honor, if I could.

21 THE COURT: Guys, you don't have to do
22 anything. It's a little late to shoot that bullet.

23 MR. MILLER: Can we go to the verdict
24 sheet? Because they're deliberating now, right, so we
10:36:45 25 literally -- my sense is we ought to focus on what

1 exactly this is going to say and get it in their hands.

2 THE COURT: Yeah.

3 MR. MILLER: Can I make a suggestion?

4 THE COURT: You may.

10:36:54 5 MR. MILLER: Okay. Simple question: "Do
6 you find by clear and convincing evidence in favor of
7 Plaintiff on Plaintiff's claim of fraud in the
8 inducement?" It just takes out --

9 THE COURT: Okay. I tried to say that.
10:37:05 10 You said it better. I'll take care of that. That's the
11 correct way.

12 MR. MILLER: We believe that it ought to
13 continue, "Based on the marketing materials, based only
14 on the marketing materials."

10:37:19 15 THE COURT: That's in the charge.

16 I'll do it the way you said it here.

17 Okay. We'll take a short break and then
18 I've got a plea, but I want you to get your exhibits, and
19 then if we have objections, first of all, put all the
10:37:30 20 exhibits that you agreed to in one spot, and then we'll
21 do that first. And then if there are -- we'll take those
22 back.

23 And then if there are objections, we'll do
24 that.

10:37:40 25 MR. MILLER: Thank you. Is there any

1 assistance we can provide, Your Honor, in expediting the
2 verdict sheet, if you want us to do any typing?

3 THE COURT: No.

4 MR. MILLER: Okay. We'll step away.

10:37:49 5 THE COURT: We're big boys here and big
6 girls. Right, General?

7 (Recess taken)

8 (11:15 a.m.)

9 THE COURT: Anyway, all right. So the
11:15:09 10 Plaintiff is offering Exhibits 1 through 800,000 and
11 there's only one objection?

12 MR. MILLER: It's the other way around,
13 Your Honor. We have objections and Mr. Kelleher can
14 address those to their exhibits. I think we get through
11:15:23 15 them quickly, and they I think have one objection or two
16 objections to two of our exhibits so.

17 MR. CARNEY: Actually three.

18 MR. MILLER: You guys can go first. It
19 doesn't matter.

11:15:36 20 THE COURT: I guess I'm not making myself
21 clear.

22 What exhibits are you offering, and
23 then -- that are without objection? That's the first
24 question.

11:15:45 25 And you just give us the number of the

1 exhibits. We don't need to know anything else.

2 MR. CARNEY: Do you want without objection?

3 THE COURT: Correct.

4 MR. CARNEY: Okay. Plaintiff's Exhibit 18,
11:16:08 5 19.

6 THE COURT: Listen.

7 MR. KELLEHER: I'm not ready to listen.

8 Hold on. Now I'm ready to listen.

9 Thank you.

11:16:20 10 THE COURT: Okay.

11 MR. CARNEY: Plaintiffs are offering the
12 following exhibits, without objection: 18, 19, 40, 41,
13 55, 59, 60, 69, 70, 71, 73, 77, 78, 79, 85, 92, 134, 156,
14 158, 161, 162, 163, 176, 177, 178, 180, 226, 246, 247,
11:17:21 15 259, 262, 266, 314, 316, 402, 426, 435, 436, 437, 439,
16 607, 617, 618, 622, 1000, 1002, Joint Exhibits 9, 11, 24,
17 30, 32, 68, 89, 119, 124, 129, 130, 131, 151, 157, 159,
18 160, 166, 227, 263, 264, 291, 294, 299, 453, Defendant's
19 Exhibits 12, 126, 136, 137, 307, 316, 826, and 840.

11:19:04 20 THE COURT: And which ones are being
21 objected to?

22 MR. CARNEY: The Defendant has objected to
23 34, 35, 36, 38, 52, 84, 109, 252, 253, 267, 606, 615.

24 MR. KELLEHER: There's no objection to 606.

11:19:58 25 MR. CARNEY: I apologize.

1 So 606 comes in without objection.

2 615, 621, 623, and then our demonstratives
3 1001, 1003, and 1004.

4 That's it.

11:20:30 5 THE COURT: Okay. How about the defense?

6 MR. KELLEHER: Judge, SAP offers Exhibit
7 Number 4, Exhibit Number 5, Exhibit Number 8, Number 9,
8 Number 10, Number 11, Number 12, Number 17, Number 18,
9 21, 24, 30, 32, 34, 36, 40, 41, 57, 68, 70, 77, 89, 109,
11:21:34 10 119, 121, 122, 123, 124, 126, 128, 129, 130, 131, 136,
11 138, 139, 142, 145, 151, 157, 158, 159, 160, 163, 165,
12 166, 167, 195, 202, 214, 215, 216, 217, 227, 246, 255,
13 258, 262, 263, 264, 277, 291, 293, 294, 299, 301, 306,
14 307, 311, 312, 314, 316, 318, 320, 325, 327, 330, 332,
11:23:23 15 428, 439, 453, 508, 617, 618, 700, 740, 748, 755, 785,
16 786, 788, 789, 798, 809, 816, 817, 818, 820, 821, 822,
17 824, 825, 826, 827, 828, 830, 834, 840. Excuse me, 834
18 is objected to. 840, 844, 848, 889, 899, 901, 907, 909,
19 910, 911, 912, 913. Those are the exhibits that SAP
11:24:54 20 enters without objection.

21 There are two exhibits that SAP would like
22 to offer into evidence to which there has been objection.

23 My colleague tells me I may have missed two
24 that were without objection. 913 and 914. Is that all
11:25:21 25 of them? Okay. So there are two that have been objected

1 to. That's 281 and 834, and we pose them for additional
2 comment.

3 THE COURT: Okay. I guess I'm going to
4 have to ask you now, what's 34?

11:25:40 5 MR. MILLER: 834?

6 THE COURT: No. No. Plaintiff's 34. I'm
7 sorry.

8 MR. LAMBERT: Plaintiff's 34 is marketing
9 literature that was distributed by SAP that the channel
10 partner, I think at least Dan Lowery, I think
11 Van Leeuwen, testified they looked at and relied upon in
12 marketing Business One.

13 MR. KELLEHER: Judge, I actually have a
14 volume that has all the exhibits in it for you. Do you
11:26:09 15 want to take a look at it?

16 THE COURT: Yes. Thanks.

17 MR. KELLEHER: I have a copies for you guys
18 as well.

19 THE COURT: That was pretty bad. Tell me
11:26:21 20 he didn't win any points for that. He's oblivious, but
21 that's okay.

22 MR. KELLEHER: So, Judge, this is marketing
23 materials that contain -- from October of 2003. It
24 discusses the product, but it's not one of the documents
11:26:41 25 Hodell claims it actually relied upon. Remember, Hodell

1 said there were two of them; 314 and 617.

2 So this document, when you look at it, it
3 has the same words in it, right, from ten to several
4 hundred employees, but this isn't a document Hodell said
11:26:55 5 they relied on.

6 THE COURT: I got you. Okay. Thank you.

7 35 is --

8 MR. KELLEHER: Are you asking me, Judge?

9 THE COURT: No. No. Since they're

11:27:06 10 offering it, I see that it's a -- introducing -- I guess
11 since you were so kind to give us these, what's the basis
12 of getting it in and what's the objection?

13 MR. LAMBERT: Well, the basis of getting it
14 in, Mr. Lowery testified -- and I know that at least
11:27:23 15 Mr. Lowery testified and perhaps Mr. Van Leeuwen -- that
16 this was information that they received from SAP in order
17 to educate them on the product and that was part of the
18 basis of that, again of marketing the software to Hodell.

19 THE COURT: Okay.

11:27:42 20 MR. LAMBERT: Now, again, I know that the
21 Court has said that we can't rely upon -- or the jury
22 can't rely upon the representations by LSi and IBIS, but
23 it forms the basis for our understanding of what was
24 opined.

11:28:02 25 THE COURT: Okay. Same objection?

1 MR. KELLEHER: Yes, Judge. And actually if
2 it's helpful to you, I have our objections written on a
3 sheet that I've shared with opposing counsel.

4 THE COURT: Why not?

11:28:11 5 MR. KELLEHER: If you'd like it, it might
6 expedite it and move it along. We have the same response
7 to this exhibit, Judge.

8 It wasn't one of the two exhibits they told
9 this Court they relied upon. It has some of the similar
11:28:23 10 language in there. It's irrelevant, and to the extent
11 there is any relevance, the jury's substantially likely
12 to be misled into thinking Hodel did actually rely on
13 this when they told this Court they have not.

14 THE COURT: Okay. Got you.

11:28:36 15 36, same thing? Same?

16 MR. LAMBERT: 36 is essentially the same
17 thing as one of the pages of Exhibit 314 that the
18 Judge -- the Court has put in the jury instruction, and
19 if I may, I mean, their objections to these are presuming
11:28:58 20 the jury isn't going to follow the jury instructions.

21 THE CLERK: Can you guys talk into the mics
22 so Sue can hear?

23 MR. LAMBERT: Sorry.

24 I think the jurors are perfectly capable of
11:29:13 25 following the jury instructions as to what the charge is.

1 Again, these are documents that have no other objection
2 that they're making as to admissibility other than they
3 don't -- Hodell didn't rely upon them. That's not why
4 they're being submitted into evidence.

11:29:32 5 THE COURT: Okay. How about 38 and the --

6 MR. LAMBERT: Same thing. I mean,
7 it's -- it's literature that was given out to SAP's
8 channel partners who testified that they had to rely on
9 this in order to market Business One to Hodell.

11:29:50 10 Obviously, we had to rely at least in part
11 on representations made by -- or statements, whether they
12 were on behalf of SAP, whoever they're speaking on behalf
13 of, as to deciding how to buy this product. This forms
14 the basis for what we were told.

11:30:07 15 MR. KELLEHER: Again, I don't -- Judge, may
16 I speak?

17 THE COURT: Yeah.

18 MR. KELLEHER: I don't understand the basis
19 of the objection. The Court asked them very clearly --

11:30:14 20 THE COURT: You're the one objecting.

21 MR. KELLEHER: That's a good point.

22 (Laughter).

23 MR. KELLEHER: I don't understand the basis
24 of what Mr. Lambert just said.

11:30:20 25 I do understand our objection, which is

1 they told the Court that they were relying on two
2 documents. This wasn't one of them.

3 But this is even worse, Judge, because you
4 struck their return on investment claim, and this
11:30:30 5 document is the ROI, talks about the ROI calculator for
6 SAP Business One. It's completely irrelevant, and it's
7 likely to mislead the jury into thinking there is a claim
8 for return on investment when there patently is not.

9 And I keep hearing Mr. Lambert talk about
10 the business partner.

11 MR. CARNEY: Your Honor.

12 MR. KELLEHER: This Court has held --
13 pardon me. And this Court has held, as a matter of law,
14 that IBIS/LSi was not SAP's agent. So I don't think
11:30:54 15 there's anything to say about that.

16 MR. CARNEY: Your Honor.

17 THE COURT: Interesting what you just said.
18 You said they keep referring to them as a business
19 partner and that I have held they are not the agent.

11:31:04 20 Those are two different things, aren't
21 they?

22 MR. KELLEHER: Yes, Judge.

23 THE COURT: Okay.

24 MR. KELLEHER: The factual matter of
11:31:07 25 whether they are our business partner is a different

1 thing, but the thing that matters in this case is whether
2 or not they are our agent, and you have held they are
3 not.

4 THE COURT: I know, but you were
11:31:16 5 complaining that he was calling them your business
6 partner.

7 MR. KELLEHER: That's what he means.

8 (Laughter).

9 THE COURT: Okay.

11:31:20 10 MR. KELLEHER: And it's beside the point,
11 Judge. No, it's not all like that, and you struck the
12 claim. I don't get it.

13 THE COURT: All right. Got you.

14 52.

11:31:30 15 MR. CARNEY: Your Honor, before we go on,
16 we'll withdraw 38.

17 THE COURT: Okay.

18 MR. LAMBERT: 52 was a -- 52 is an e-mail
19 Dan Lowery sent to several individuals at SAP, including
11:31:57 20 the CEO, came in through Geoff Ashley. There's no
21 dispute that it was sent and received. It's not hearsay.
22 And it talks about the In-Flight, the rollout of
23 In-Flight, and Hodell specifically --

24 THE COURT: Okay. What's the objection?

11:32:19 25 MR. KELLEHER: Judge, the objection is that

1 the only witness Hodell showed this to was Otto Reidl.
2 He's not anywhere on the address line of the e-mail. And
3 there's no foundation for this document.

11:32:35

4 THE COURT: Well, it is a business record,
5 isn't it?

6 MR. KELLEHER: Was a foundation laid for
7 the business record? I didn't hear.

8 THE COURT: Well, I'm talking about as a
9 practical matter.

11:32:44

10 MR. LAMBERT: I looked through the record,
11 Your Honor. It was shown to Geoffrey Ashley. I looked
12 in the transcript. I can give you the page.

13 THE COURT: Okay.

14 MR. CARNEY: 1455 and 56.

11:32:56

15 MR. KELLEHER: Judge, we also looked and if
16 we're mistaken, we will withdraw it. If it was shown to
17 Mr. Ashley, we will withdraw that objection.

18 THE COURT: All right. And then 109?

11:33:09

19 MR. LAMBERT: 109? I have 84 in here. Is
20 there no objection to 84?

21 THE COURT: That's what we were just
22 talking about, I thought.

23 MR. LAMBERT: No, we were talking about
24 Exhibit 52.

11:33:17

25 THE COURT: Wait a minute. I must have

1 gone one too fast.

2 52 was the Las Vegas thing.

3 MR. LAMBERT: Yeah.

4 THE COURT: With the ROI, wasn't it?

11:33:26 5 MR. LAMBERT: No, the ROI was 38.

6 MR. MILLER: And that's the one they

7 withdrew.

8 THE COURT: 38 they withdrew.

9 MR. MILLER: Correct.

11:33:43 10 THE COURT: Okay. And then 84, I got that

11 figured out.

12 109.

13 MR. LAMBERT: No, 84 --

14 THE COURT: No, you didn't do 84?

11:33:52 15 MR. LAMBERT: We haven't figured out 84?

16 What's the objection to 84?

17 THE COURT: There is no 82.

18 MR. LAMBERT: 52 we were just discussing.

19 THE COURT: 52.

11:34:00 20 MR. LAMBERT: Was the In-Flight.

21 THE COURT: I got that. And 84 seems to be

22 the same thing to me.

23 MR. LAMBERT: What's the objection to 84?

24 MR. CARNEY: Hearsay.

11:34:07 25 THE COURT: Yes.

1 MR. KELLEHER: Actually, Judge, 84 is a
2 little different. If you'll just give me a moment, I'm
3 happy to --

4 THE COURT: I mean, I know it's a different
11:34:17 5 document.

6 MR. KELLEHER: Our objection is very
7 different.

8 THE COURT: Is it? Okay.

9 MR. KELLEHER: Can I state the objection,
11:34:20 10 Judge?

11 THE COURT: Yeah.

12 MR. KELLEHER: If you look on Page 2 of 84,
13 this is the e-mail that comes below the e-mail on the
14 first page. It says, "Good afternoon, Dan." It's
11:34:30 15 written by Otto Reidl, copied to Eugene Krautus. That's
16 his lawyer.

17 And if you look at -- I'm on Page 2. If
18 you look at what's highlighted on the third paragraph
19 there, it says, "The progress of the project is painfully
11:34:44 20 slow and continues to have a severe impact on our
21 operations, and thus, our financial performance. To put
22 things in perspective, our bottom line in March came in
23 \$200,000 below where it should have been, and given our
24 recent business trends and our budget income level, while
11:35:00 25 we can't attribute a hundred percent of the shortfall to

1 this project, I'm certain that the majority of it, via
2 lost sales, operational difficulties and overruns," et
3 cetera, et cetera.

4 Judge, they don't have a claim for lost
5 sales, and they told this Court that over and over again.

6 THE COURT: Okay.

7 MR. KELLEHER: This is not a relevant
8 document, and to the extent there is any relevance, it's
9 prejudicial.

10 THE COURT: I got you. I got you.

11 MR. LAMBERT: That objection is baseless,
12 Your Honor.

13 THE COURT: Okay. Here. Let's go to 109.

14 MR. LAMBERT: 109 was actually shown, shown
15 by Mr. Miller in closing argument, put up on the screen.

16 I don't understand how they could possibly
17 object to 109.

18 MR. MILLER: Agreed. Withdrawn.

19 THE COURT: Okay. 252.

20 MR. LAMBERT: What's the objection to 252?

21 MR. CARNEY: It's a blurry copy.

22 MR. LAMBERT: This is the copy that we had,
23 Your Honor. This is the license agreement. This is
24 Hodell's copy. This is the copy we had in our records.

25 THE COURT: Why are you objecting to this?

1 MR. KELLEHER: Because it's a blurry copy,
2 Judge. 316 is the clear copy. They want them to look at
3 the blurry stuff. I mean --

4 MR. LAMBERT: They are going to have them
11:36:23 5 both.

6 MR. MILLER: Forgive me, but there is some
7 chance of confusion.

8 THE COURT: I'm with you. 316 is already
9 in, right?

11:36:31 10 MR. MILLER: Yes.

11 THE COURT: It's clear?

12 MR. KELLEHER: And 316 has both signatures
13 on it.

14 MR. LAMBERT: That's the point. We didn't
11:36:37 15 receive a countersigned copy, Your Honor. This is the
16 only copy we had.

17 THE COURT: But you didn't have to, right,
18 according to the contract. You know, signature
19 separately was okay. I think that's what I read sometime
11:36:49 20 in the past.

21 MR. LAMBERT: That's fine.

22 THE COURT: 253.

23 MR. LAMBERT: What's the basis for this
24 objection?

11:36:57 25 MR. CARNEY: Relevance, unfair prejudice

1 and jury confusion.

2 MR. LAMBERT: You know, I don't know what
3 to tell you. This is an admission by the vice president
4 of SAP Business One division in 2007 that at least at
11:37:16 5 that point in time, he knew the software wasn't working
6 before the go-live date.

7 I assume they're objecting because of the
8 breach of warranty claim. It's admissible for other
9 purposes. There's --

11:37:28 10 THE COURT: Okay. I got you.

11 MR. LAMBERT: The jury has been adequately
12 instructed on that issue.

13 THE COURT: What's the objection on that?

14 MR. KELLEHER: Judge, that's exactly right.

11:37:37 15 You have struck the breach of warranty and the breach of
16 contract claim. That's what this is talking about.
17 That's the only reason they want this in is because it
18 says, "Failure to conform to the documentation."

19 There is no claim for failure to conform to
11:37:45 20 the documentation. There's no relevance to this
21 document. It's highly prejudicial, even if there were.

22 THE COURT: Got you.

23 267.

24 MR. LAMBERT: I have 259 in here. Is there
11:37:56 25 an objection to 259?

1 MR. MILLER: No.

2 Can I ask for procedure? Since these are
3 our objections, I think we will move more efficiently if
4 Joe just --

11:38:07 5 THE COURT: We're almost finished.

6 MR. LAMBERT: Is there an objection to 259?

7 THE COURT: No.

8 MR. LAMBERT: No. Okay.

9 THE COURT: 267, what's the objection to
11:38:13 10 this?

11 MR. KELLEHER: Judge, the objection to 267
12 is that this is an e-mail from Mr. Kraus to
13 Mr. Killingsworth on September 29th. Mr. Kraus asked him
14 to have a confidential conversation with Otto Reidl and
11:38:32 15 he does and he lists what Mr. Reidl told him. It's
16 hearsay.

17 They didn't ask -- Mr. Killingsworth had no
18 personal knowledge -- he testified to that -- as to the
19 veracity of the figures. Mr. Killingsworth wasn't asked
11:38:44 20 in questions about where, under what circumstances he
21 provided these hearsay figures. He was just asked to
22 parrot the contents of the e-mail.

23 They shouldn't be allowed to try to prove
24 their damages claim through unreliable hearsay as opposed
11:38:58 25 to actual records. And it's undisputed they don't have

1 the records.

2 One last point, Judge, it says --

3 THE COURT: Got you. Got you. I got you.

4 MR. KELLEHER: -- and it's lost sales and

11:39:10 5 there is no claim for lost sales.

6 THE COURT: 615 is what?

7 MR. LAMBERT: The SAP annual reports

8 compendium.

9 I think it was actually, correct me if I'm

11:39:18 10 wrong, Chris, but culled down to just a select few pages

11 from one of the annual reports.

12 MR. CARNEY: Yes.

13 MR. LAMBERT: And maybe I'm incorrect.

14 MR. CARNEY: Yeah, you're right.

11:39:32 15 MR. LAMBERT: I'll let you handle that.

16 I'm not sure.

17 THE COURT: All right. Let's just go to

18 621.

19 MR. KELLEHER: 621, Judge.

11:39:40 20 Judge, 621, I think we can do it together

21 with 623. These are the Profit 21. They're summary

22 documents of their expenditures for Profit 21.

23 THE COURT: Oh, all right.

24 MR. KELLEHER: Remember, there's no backup

11:39:51 25 documentation. The claim is out.

1 THE COURT: Got you.

2 MR. LAMBERT: There wasn't -- just real
3 quickly, there wasn't a claim for the Profit 21
4 implementation cost. They disputed we actually spent
11:40:03 5 that money to replace Business One and it was put in for
6 that purpose. So they are the ones that opened the door
7 to that. If we -- you know, obviously proved it up
8 through those records.

9 So I don't understand why they would be
11:40:15 10 objecting to us. I understand why they would be
11 objecting, but there's no basis for it.

12 THE COURT: Okay. And then how about 1001?
13 That -- is that different than some other exhibit that's
14 been introduced?

11:40:30 15 MR. KELLEHER: No, Judge. We're going to
16 withdraw our objection to 1001.

17 THE COURT: How about 1003?

18 MR. KELLEHER: You say 1003, Judge?

19 THE COURT: Yeah.

11:40:40 20 MR. KELLEHER: We maintain this objection
21 for sure.

22 Judge, this is the heartbeat chart, just so
23 we're looking at the same thing, right?

24 THE COURT: Um-hm.

11:40:46 25 MR. KELLEHER: Got those two lines. And we

1 printed them in black and white because we ran out of
2 color.

3 But the whole purpose of this demonstrative
4 by the Plaintiffs was to show the difference between
11:40:52 5 these two lines, right, between the red and the blue
6 lines, but this chart is set up in such a way as to be
7 highly misleading. Look, they have two Y axes here.

8 THE COURT: No, no, I understand all about
9 what the testimony was on that.

11:41:06 10 MR. KELLEHER: Well, Judge, the
11 testimony --

12 THE COURT: Your objection is because it's
13 misleading?

14 MR. KELLEHER: It's fundamentally
11:41:11 15 misleading, Judge.

16 If I handed this to any professor I've ever
17 had in any quantitative course I've ever taken, I would
18 fail. There's two different axes. The intervals are
19 different. It compares apples-to-oranges. And if you
11:41:23 20 did, as we did last night, actually compare
21 apples-to-apples, in other words the intervals are the
22 same, Judge, that differential, that delta, it shrinks,
23 it vanishes.

24 MS. LUARDE: Your Honor, this --

11:41:36 25 MR. KELLEHER: How could you put this to

1 the jury?

2 THE COURT: I'm with you. I'm with you. I
3 understand.

4 MR. CARNEY: I need to address this.

11:41:43 5 THE COURT: No, you don't. No, you don't.
6 1004.

7 MR. KELLEHER: Judge, this is simple.

8 This was part of Mr. Guembel's expert
9 report. Expert reports aren't admissible. That's the
11:41:52 10 basis of our objection.

11 THE COURT: Okay. Let me go to Defendants,
12 281. What's that?

13 MR. CARNEY: 281 was that big document,
14 this Activant document. It was about a 300-page document
11:42:09 15 that they asked questions of Jaime Clarke. You know,
16 Activant is the -- developed Profit 21, and they did some
17 survey before they, you know, before they went to --

18 THE COURT: Let me take a look at it.

19 MR. KELLEHER: This isn't the whole thing,
11:42:31 20 Judge. It's huge.

21 MR. CARNEY: The witness testified that he
22 had no personal knowledge of the document, couldn't
23 identify it, and --

24 THE COURT: Okay. I got you.

11:42:40 25 MR. CARNEY: -- couldn't testify.

1 THE COURT: Why do you think this gets in?

2 MR. KELLEHER: Judge, this includes survey
3 responses, as it says on the first page -- it's
4 highlighted -- and also on the second page, from Hodell's
11:42:49 5 own employees. They were copied verbatim into this
6 report.

7 The document actually came in through
8 Mr. Clarke. His responses to those surveys are contained
9 in this document. There's no authenticity issue. It was
11:43:01 10 produced pursuant to a subpoena to Activant.

11 Hodell actually should have produced this
12 document, Your Honor. It was a report issued to them by
13 their own software provider, but they never did. So they
14 shouldn't be able to hide behind the fact they never
11:43:14 15 produced it and now say we can't authenticate it.

16 MR. CARNEY: Your Honor.

17 THE COURT: How is it relevant?

18 MR. KELLEHER: Judge, it's relevant for a
19 bunch of reasons.

11:43:27 20 MR. STAR: One of them, Your Honor, is with
21 respect to the number of line items per sales order.

22 In this survey, one of the things they
23 answered was that their average sales order is four
24 lines. They told this jury, they made it sound to this
11:43:41 25 jury like they had routinely 100-plus line item orders.

1 And it's relevant on a host of other
2 issues, including with respect to the number of total
3 orders that they take, the way in which they work, all of
4 those sorts of pieces of data that they talked about with
5 this jury.

11:43:59

6 THE COURT: Well, now, these were answered
7 by Mr. Kevin Reidl, right?

8 MR. STAR: Some of them, indeed.

9 MR. CARNEY: Pardon me? I didn't hear the
10 question, Your Honor.

11:44:09

11 THE COURT: Some of these were answered by
12 Mr. Kevin Reidl?

13 MR. LAMBERT: Yes. The testimony came in,
14 Your Honor. Mr. Star was allowed to cross-examine
15 Mr. Clarke about the responses, but the document itself
16 is three to 400 pages long, contains all kinds of other
17 statements not made by anybody in this case, and they
18 simply aren't relevant to any issues in the case.

11:44:17

19 THE COURT: Okay. Got you.

20 How about 834?

11:44:33

21 MR. CARNEY: 834, 834 was not identified
22 pursuant to Judge Wells' order, and it was -- and for
23 that reason, we don't want it in. It was not provided in
24 a timely manner. The Judge didn't allow it. And we
25 don't think it should go to the jury.

11:45:03

1 MR. KELLEHER: Judge, this one is pretty
2 easy. This is a list of Business One customers from '03
3 and '04 with high user counts. Hodel just doesn't like
4 the document.

11:45:15 5 And let's just be clear, though. Your
6 Honor issued an order on May the 12th, 2015; you asked
7 for our exhibit list. This was on that exhibit list.

8 They've had this document for a long time.
9 Paul Killingsworth laid extensive foundation for this
11:45:29 10 document in his testimony. It's highly relevant and it
11 should come in.

12 MR. CARNEY: They also never produced it in
13 discovery, Your Honor, and, you know --

14 MR. LAMBERT: The first time we saw it was
11:45:44 15 when it was included in their exhibit binder.

16 MR. KELLEHER: That's actually incorrect,
17 Judge.

18 It was produced by e-mail. I was in Mr.
19 Star's office when it happened. We didn't find the
11:45:50 20 document until later, but as soon as we found it, we
21 e-mailed it to you, Wes, on January 14th. Check your
22 e-mails.

23 THE COURT: Okay.

24 MR. LAMBERT: January 14th of what year,
11:45:57 25 sir?

1 MR. KELLEHER: This year.

2 MR. LAMBERT: Okay. How many years had
3 discovery closed after you sent that to me?

4 THE COURT: All right. Here.

11:46:05 5 The objection is sustained to Exhibit,
6 Defense Exhibit 281. Plaintiff's Exhibits 34, 35, 36,
7 84, 252, 253, 267. 615 can be reserved because it may be
8 used later, but the objection is sustained to go to the
9 jury now. 621, 623 and 1004.

11:46:34 10 And 52 will be received. 109 will be
11 received. 1001 will be received. 1003 will be received.
12 And 834 will be received over objection.

13 So if you could get those things together
14 on -- because the jury is probably champing at the bit to
11:46:56 15 get the exhibits back there.

16 Now, don't go too far. I'm sure you can go
17 to lunch, I'm guessing, but --

18 MR. MILLER: We'll be close.

19 THE COURT: Yeah.

11:47:29 20 (Proceedings adjourned at 11:47 a.m.)

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1 THURSDAY, JULY 2, 2015, 3:14 P.M.

2 THE COURT: Be seated, please, folks.

3 We have a question. It's dated today's
4 date. It reads, "The jury requests clarification" -- you
15:14:12 5 don't have them in the hallway, do you?

6 THE CLERK: No, he's just there.

7 THE COURT: Oh, okay. "The jury requests
8 clarification from the Judge to be sure we are
9 understanding Page 21 of the jury instructions correctly,
15:14:27 10 please confirm that this is the proper interpretation.

11 "Our understanding is that the Plaintiff
12 must prove (by clear and convincing evidence) all five of
13 the elements of fraud and that proof of fewer than five
14 is insufficient proof to find for the Plaintiff."

15:14:49 15 And it's signed by the foreperson.

16 I think the answer is your understanding is
17 correct.

18 MR. MILLER: You have to prove all five.

19 THE COURT: Yeah.

15:14:59 20 MR. MILLER: I think that that, rather than
21 just say, "Your understanding is correct," I think you
22 say, "Your understanding is correct, you have to prove
23 all five."

24 THE COURT: Does somebody have Page 21? I
15:15:11 25 don't have a copy.

1 MR. STAR: Yes, Your Honor. Sorry. It has
2 a couple notes.

3 THE COURT: Telling me how wrong I am?

4 MR. STAR: No, it actually says how -- no.

15:15:23 5 THE COURT: Okay. I'll give it back to you
6 in a minute.

7 (Pause)

8 I've done this a couple times where you
9 wait for the jury and then they come out and say "Oh, we
15:16:57 10 have a verdict. We're not going to wait for the answers
11 to the question."

12 (Jury in)

13 (Proceedings resumed in presence of the
14 jury as follows:)

15:17:22 15 THE COURT: Please be seated.

16 Ms. LeClaire, I have a question, and I'm
17 going to ask you one question about it and that is have I
18 correctly read your question.

19 And that is, it's dated 7/2/15. "The jury
15:17:36 20 requests clarification from the Judge to be sure we are
21 understanding Page 21 of the jury instructions correctly.
22 Please confirm if this is the proper interpretation.

23 "Our understanding is that the Plaintiff
24 must prove (by clear and convincing evidence) all five,"
15:17:59 25 underlined, "of the elements of fraud, and that proof of

1 fewer than five is insufficient proof to find for the
2 Plaintiff."

3 Now, have I correctly read your question?

4 The answer is yes, they have to prove all
15:18:13 5 five by clear and convincing evidence.

6 Thank you.

7 (Jury out)

8 (Recess taken).

9 THURSDAY, JULY 2, 2015, 3:50 P.M.

15:50:32 10 THE COURT: Okay. Be seated, folks.

11 Ms. LeClaire, has the jury reached a
12 decision?

13 Would you hand the items to the General?
14 Wait, to the General.

15:50:54 15 None of you are old enough to remember
16 Johnny Carson. Carmack? Who? I know. Make fun of me.
17 Go ahead.

18 Okay. Case Number 08CV2755, Hodell-Natco
19 Industries versus SAP America, Inc. and SAP AG.

15:51:29 20 Do you find by clear and convincing
21 evidence in favor of Plaintiff on Plaintiff's claim of
22 fraud in the inducement?

23 "Answer: No." And it's signed in ink by
24 all nine jurors and dated today's date.

15:51:41 25 I'm going to ask you just a single question

1 and that is have I correctly read your verdict juror
2 number one?

3 JUROR NUMBER 1: Yes.

4 THE COURT: Number 2?

15:51:48 5 JUROR NUMBER 2: Yeah.

6 THE COURT: Number 3?

7 JUROR NUMBER 3: Yes.

8 THE COURT: Number 4?

9 JUROR NUMBER 4: Yes.

15:51:52 10 THE COURT: Number 5?

11 JUROR NUMBER 7: 7. Yes.

12 THE COURT: Number 8? That's how we do it.

13 JUROR NUMBER 8: Yes.

14 THE COURT: 9?

15:51:56 15 JUROR NUMBER 9: Yes.

16 THE COURT: 10?

17 JUROR NUMBER 10: Yes.

18 THE COURT: 11?

19 JUROR NUMBER 11: Yes.

15:51:59 20 THE COURT: Okay. Thank you.

21 Your verdict is correct in form and in
22 substance, and each of you have answered in the
23 affirmative. And so I will accept your findings.

24 That means that your service is no longer
15:52:09 25 needed or your -- or is concluded, I should say, in this

1 case.

2 I want to take the opportunity to thank you
3 on behalf of the parties and certainly the Court for the
4 effort that you put forth.

15:52:20 5 I don't know what you knew about jury
6 service before you came down in this case, but I think at
7 the end of the day, at the end of this process, I think
8 that, I hope you walk away with the idea that if anybody
9 has a dispute, the best way to resolve is to have people
15:52:37 10 from the community who don't know any of the parties,
11 don't know anything about the case, come in here and
12 listen to the disputed testimony, follow the law as given
13 by the Court, and come up with a verdict that's
14 consistent with the evidence and the law, which you've
15:52:48 15 done in this case.

16 So you have a right to be proud of the
17 service that you've rendered, not only to the parties,
18 but to the community. And you're released from the
19 admonition I gave you.

15:52:58 20 I mentioned to you that you may discuss the
21 case if you want with somebody else, but I think really
22 as an admonishment really or comment, that your verdict
23 speaks loudly and clearly for what you believe the state
24 of the evidence to have been. So there's no need to make
15:53:14 25 any comment to anybody about any aspect of the case, but

1 to your friends and family, you know, feel free.

2 And one danger always that people talk
3 about the case is that, you know, your verdict is a
4 collective verdict so you wouldn't be speaking for
15:53:27 5 anybody else if you did talk to somebody.

6 So with that, anything further on behalf of
7 the Plaintiff?

8 MS. LUARDE: No, Your Honor.

9 THE COURT: On behalf of the Defense?

15:53:34 10 MR. STAR: No. Thank you, Your Honor.

11 THE COURT: All right. You're excused.

12 I'll be back in a minute to answer any questions that you
13 may have.

14 THE CLERK: All rise for the jury.

15:53:42 15 (Jury out)

16 (Proceedings adjourned at 3:54 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Susan Trischan

/S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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